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No. 486

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

TIDEWATER OIL COMPANY,
Petitioner,

vs.

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As JACKSON BROTHERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Supreme Court of the United States:

Petitioner, Tidewater Oil Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The United States District Court for the District of Kansas did not write an opinion, but it entered findings of fact and conclusions of law (R. 39-55), which are copied in Appendix "A", *infra* A1-A23. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 3) is reported in F.2d , and is copied Appendix "B", *infra* A24-A40. The opinions in the prior litigation between petitioner and respondents before the Kansas Corporation Commission and in the Kansas courts are also copied in appendices, the Memorandum Opinion of the Kansas Corporation Commission (R. 22), in Appendix "C", *infra* A41-A51, the opinion of the District Court of Greenwood County, Kansas (R. 32), in Appendix "D", *infra* A52-A53, and the opinion of the Kansas Supreme Court in *Jackson* v. *State Corporation Commission*, reported in 186 Kan. 6, 348 P.2d 613 (1960), in Appendix "E", *infra* A54-A63.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was dated and entered June 21, 1963 (R. 4), and is copied in Appendix "F", *infra* A63.

2. The date of the order of the United States Court of Appeals for the Tenth Circuit overruling petitioner's petition for rehearing is July 18, 1963. (R. 4)

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit by writ of certiorari is United States Code, Title 28, Section 1254, paragraph (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether (in this case where federal jurisdiction rests exclusively on diversity of citizenship) the Court of Appeals erred in deciding against petitioner the same pivotal question decided in petitioner's favor in prior litigation in the Kansas state courts between petitioner and respondents, the Kansas Supreme Court having decided in the state suit that the water flooding by petitioner, conducted under an order of the Kansas Corporation Commission, should not be stopped on respondents' complaint, because it did not injure respondents' correlative property rights in the oil reservoir being water flooded, and the Court of Appeals deciding to the contrary in holding that petitioner is liable to respondents in damages, because the same water flooding did injure respondents' correlative property rights in the same oil reservoir.

2. Whether the Court of Appeals erred in holding that petitioner's water flooding (which in prior litigation between petitioner and respondents had finally been decided by the Kansas Supreme Court to be an act lawfully undertaken and lawfully done pursuant to a valid order of the Kansas Corporation Commission issued under authority of the Kansas conservation statutes and not causing either waste or damage to respondents' correlative rights) was nevertheless "wrongful and actionable in the common law sense," so that liability for damages was properly imposed upon petitioner for such water flooding.

3. Whether the Court of Appeals erred in holding that because this case is a suit in tort for damages, whereas the prior litigation between petitioner and respondents in the Kansas Commission and courts was a proceeding for a cease and desist order to stop petitioner's water flooding,

therefore respondents are not bound by the adjudication against them by the highest court of Kansas of the same "operative facts" upon which respondents' claim rested in the prior litigation and also rests in this case, namely, the facts as to whether petitioner's water flooding injured respondents' correlative rights in the oil reservoir involved in both cases.

4. Whether the Court of Appeals erred in refusing to follow the law of Kansas as finally decided by the Supreme Court of Kansas in prior litigation between petitioner and respondents, that the Kansas Corporation Commission had given respondents their day in court and had properly decided that petitioner's water flooding did not injure respondents' correlative rights in the oil reservoir.

5. Whether the Court of Appeals erred in holding that the Kansas Conservation statutes authorizing water flooding under orders of the Kansas Corporation Commission and providing for judicial review of such orders in the Kansas courts, do not provide a method whereby the common source of supply of oil is subjected to legalized regulation and wherein the relative rights of the interested parties are determined and constitutionally protected.

6. Whether the decision of the Court of Appeals has not seriously jeopardized fair and uniform regulation by state administrative agencies of secondary recovery of oil through water flooding by holding that (in cases where diversity of citizenship exists) a party complaining of such water flooding on the ground that it damages his property rights in the flooded reservoir can have a second, independent determination by the federal courts of the question whether the water flooding injures his property rights, after he has resorted to the state agency and courts for relief and they have decided against his claim that his property rights are being injured.

KANSAS STATUTES AND KANSAS CORPORATION COMMISSION REGULATIONS INVOLVED

The Kansas statutes involved are the statutes authorizing the injection of water for the purpose of recovering oil and gas and directing the State Corporation Commission to prescribe rules and regulations to carry out the provisions of the statute (Kansas General Statutes, 1949, 55-133 and 55-134) and providing for judicial review by the Kansas courts of the orders of the State Corporation Commission (Kansas General Statutes, 1949, 55-606). These statutes are copied in Appendix "G", *infra* A63-A66.

The regulations of the Kansas Corporation Commission involved in this case are the Commission Rules and Regulations 82-2-101, defining correlative rights, and 82-2-500 through 82-2-505, relating to water flooding. These rules and regulations are copied in Appendix "H", *infra* A66-A70.

STATEMENT OF THE CASE

Federal jurisdiction in this suit rests exclusively upon diversity of citizenship, the suit being by two Kansas citizens, Jackson Brothers, owners of an oil lease, against Tidewater Oil Company, a Delaware corporation, for alleged damages caused by water flooding of the oil reservoir by Tidewater.

The oil field involved in this case (the Blankenship-Sallyard Field in Butler and Greenwood Counties, Kansas) was discovered in 1917; within about ten years it was fully developed; and by 1948, it was substantially depleted for primary recovery of oil. In 1948, Tidewater began secondary recovery operations by water flooding which, as the

Court of Appeals recognized, is a legally and scientifically accepted method of producing oil by injecting water into the oil reservoir after primary production methods are no longer feasible. On July 27, 1953, Tidewater obtained an order from the Kansas Corporation Commission granting authority to water flood the oil reservoir, which order is still in effect.

In 1954, the respondents, Jackson Brothers, obtained the lease under which they are now operating on land adjoining part of Tidewater's leases. Respondents' wells were drilled in close proximity to the boundaries of the Tidewater leases from 1954 through 1956. The producing formation in these wells was heavily fractured.

After failing in an effort to obtain an agreement for cooperative flooding with respondents, in 1956 Tidewater drilled and began injecting water into wells on its leases adjoining respondents' lease. On December 4, 1956, respondents filed a complaint with the Kansas Corporation Commission against Tidewater, asserting that the water flooding by Tidewater was damaging respondents' properties in the oil reservoir by displacing oil with salt water and causing loss of production from respondents' wells, and praying that the Kansas Corporation Commission order Tidewater to stop its water flooding on its adjoining leases.

The Commission issued a temporary order shutting down Tidewater's injection wells adjacent to respondents' lease, pending a public hearing on the complaint, which was held on December 16 and 27, 1956. All parties were represented by counsel and expert and other evidence was heard. The matter was taken under advisement by the Commission, which on March 6, 1957, handed down its Memorandum Opinion. The Commission found that the manner of water flooding by Tidewater, in injecting water

in wells along boundary lines, was the only way to prevent the movement of oil from lease to lease and thus protect correlative rights and it concluded that Jackson Brothers had failed to show any injury to their correlative rights. (R. 30-31) The Commission therefore dismissed the complaint and rescinded the order temporarily suspending the authority of Tidewater to water flood its leases adjacent to respondents' property. (R. 31-32)

The order of the Corporation Commission, refusing to stop the water flooding by Tidewater, was appealed by respondents to the District Court of Greenwood County, Kansas. The State Corporation Commission was named as defendant and Tidewater intervened. After procedural questions had been disposed of (see *Jackson* v. *State Corporation Commission*, 183 Kan. 246, 326 P.2d 280 (1958)), the case was heard by the Kansas District Court upon the merits, and that court held, on the point that is relevant here, that the Jacksons "have now had their day in court and had a determination of their correlative rights." The Court concluded that it was "in substantial agreement with all of the findings of the Commission, and that the decision of the State Corporation Commission should be affirmed in whole." (R. 33)

An appeal from this judgment was taken by Jackson Brothers to the Kansas Supreme Court, where the trial court's judgment was affirmed. *Jackson* v. *State Corporation Commission*, 186 Kan. 6, 348 P.2d 613 (1960).

The Supreme Court of Kansas referred with approval to the finding of the trial court that Jackson Brothers had "had their day in court and had a determination of their correlative rights." (348 P.2d at 616) It pointed out that the Commission's rule as to correlative rights provided that no producer should be enriched to the detriment of other producers in a common source of supply by causing

undue drainage between developed leases, and that the Commission had found that the only way to prevent movement of oil from one lease to another and protect correlative rights in a water flood program was to place input wells along the boundary between leases. (348 P.2d at 616) It noted the Commission's conclusion to be "that no waste of natural resources or injury to correlative rights" was shown. The conclusion of the Supreme Court of Kansas was that the Kansas trial court "was correct in affirming the findings of the Commission, which findings were based on substantial competent evidence, and was likewise correct in affirming the decision based on those findings." (348 P.2d at 617).

While their suit in the Kansas state court was pending Jackson Brothers filed the present action in the United States District Court, on June 30, 1958. This case, however, was not brought to trial until January 25, 1960. Two days previously, on January 23, 1960, the opinion of the Supreme Court of Kansas, terminating the state case in favor of Tidewater, was handed down.

At the outset of the trial in the United States District Court, counsel for Tidewater called the attention of the trial Judge to the decision of the Kansas Supreme Court, and urged that Jackson Brothers were estopped by the final judgment of the Kansas courts to litigate again the same issues which had been decided against them by the Kansas courts. (R. 62) The United States District Court overruled a motion for summary judgment (R. 77), but permitted the filing of a trial amendment, urging the defense of estoppel by judgment. (R. 14, 292)

At the trial, Tidewater introduced in evidence the relevant parts of the record before the Kansas State Corporation Commission and in the Kansas courts in the earlier

litigation (R. 10, 18, 31, 52, 524, 525). It was agreed that the Court would take judicial notice of the decision of the Kansas Supreme Court in *Jackson* v. *State Corporation Commission*. (R. 439)

The United States District Court heard voluminous and sharply conflicting expert testimony as to whether the water flooding operations of Tidewater had damaged Jackson Brothers or, on the other hand, had benefited Jackson Brothers by making it possible for them to recover a much larger quantity of oil than they could have recovered if Tidewater had not water flooded the reservoir. On such conflicting evidence, the United States District Court made fact findings favorable to Jackson Brothers. (R. 39).

The United States District Court made only scant reference to the orders of the Kansas Corporation Commission and the prior litigation which had taken place between the parties before the Kansas Corporation Commission and on appeal in the Kansas courts. It concluded (R. 54) that the original order of the Kansas Corporation Commission, issued in 1953, did not authorize the water flooding operations complained of by Jackson Brothers, and that the Commission's 1957 order, entered on the specific complaint of Jackson Brothers against Tidewater, and the judgments of the Kansas trial court and the Kansas Supreme Court on appeal from that order, "did not present or determine the issues involved in this case and the Commission lacked jurisdiction to consider or determine these issues." The United States District Court therefore concluded that there was no estoppel by judgment against Jackson Brothers. (R. 54) It entered judgment against Tidewater for $620,700.00 "actual damages" and $25,000.00 "punitive damages." (R. 55)

An appeal was taken by Tidewater to the Court of Appeals, where the points here urged were duly raised and argued.

The Court of Appeals in its opinion in this case concedes that the defense of estoppel by judgment, if valid, is "dispositive of the law suit." (*infra* A29) It also recognizes that Kansas adheres "to the salutary rule which plainly forbids a suitor to twice litigate matters against the same party, even on a different cause of action." (*infra* A29-A30) It further concedes that in general "a suitor may have a full day in court in an administrative tribunal, on matters within its competence, quite as effectively and conclusively as any other adjudicatory tribunal" (*infra* A30) and specifically that "the determinations of the Kansas Corporation Commission, of matters within its competence, is undoubtedly binding here, in so far as applicable to this asserted claim." (*infra* A31)

Going even further, the Court of Appeals concedes that "in this suit, no one can deny the validity of the order permitting Tidewater to water flood its properties, or that the water flood operations were being conducted in accordance with a valid order." (*infra* A32) The reason for this conclusion, as stated by the Court, is that "that issue has been conclusively adjudicated in the Kansas courts." (*infra* A32) It recognizes that the adjudication in the Kansas courts is "contrary to the trial court's findings" (*infra* A32) on the extent of the authority granted by the Commission's order and that the trial court's findings in this case are "irreconcilably inconsistent with the conclusive administrative findings to the effect that the water flooding operations were carried on in a lawful manner." (*infra* A36)

In spite of these concessions as to the effect of the prior litigation, the Court of Appeals affirms the judgment

of the District Court, except that it reverses the judgment for punitive damages. (*infra* A40)

As the primary basis for its decision, the Court of Appeals says that it agrees with the District Court's view that "the order of the Commission did not purport to determine the issues involved in this case; and did not, therefore, work an estoppel to assert this tortious claim." (*infra* A31) Exactly what the Court of Appeals means by this statement is not clear. It apparently means that the Commission did not decide the issue of injury to the correlative rights of the interested parties, although earlier in its opinion the Court acknowledges that the Commission expressly stated that the issues within its province included not only the prevention of waste but also "the protection of correlative rights of interested parties in a common source of supply." (*infra* A27) In order to sustain the District Court's conclusion, the Court of Appeals reads into the Commission's definition of "correlative rights" a limitation which cannot be found in the definition, and ignores a significant part of that definition. The Court says that correlative rights, as defined by the Commission, relate "only to the ratable withdrawal of oil and gas from a common reservoir." (*infra* A28) It ignores the part of the definition relating to the "manner" of production, which requires that production must be conducted in such a way as not to injure the oil reservoir to the detriment of others or to cause undue drainage between developed leases. The Court reaches the startling conclusion that the Kansas Corporation Commission, on the question of correlative rights of the parties, found that "there was nothing for the Commission to decide." (*infra* A28).

Perhaps because this construction of the Commission's opinion is entirely inconsistent with the construction of that opinion by the Kansas courts, the Court of Appeals goes

on to say in substance that in any event the Commission could not make binding determinations of the "operative facts" on which tort liability is based. The Court of Appeals holds that since the Commission has "no power to adjudge tort liability," therefore it cannot make a "conclusive adjudication of the operative facts" upon which tort liability must rest. (*infra* A32) The Court holds that although it has been "conclusively adjudicated in the Kansas courts" that "the water flood operations were being conducted in accordance with a valid order" (*infra* A32) and therefore that Tidewater's acts are "lawfully undertaken and lawfully done" (*infra* A32), and were "committed under color, and in accordance with, Kansas law" (*infra* A39), still the federal courts were free to determine and hold that these same acts by Tidewater were "wrongful and actionable in the common law sense." (*infra* A39) The exact basis of Tidewater's liability "in the common law sense" is not clearly stated, but apparently it is that the water flood project is "a legalized nuisance or trespass." (*infra* A39) The Court of Appeals held that since the District Court was not bound by the contrary findings made by the Kansas Commission and courts, it was free to determine *de novo* the issue of injury to respondents' property rights in the oil reservoir and to credit respondents' experts, "as against the contravailing and equally competent testimony of Tidewater" (*infra* A37) that respondents had not been damaged but in fact had greatly benefited from the water flooding of the oil reservoir by Tidewater.

REASONS FOR THE ALLOWANCE OF THE WRIT

Petitioner submits that review on writ of certiorari should be granted in this case because the Court of Appeals has decided an important state question in a way in conflict with applicable state law, and because the decision of

the Court of Appeals presents an important question of the administration of justice as between the state and federal courts.

The decision of the Court of Appeals, affirming the trial court's judgment for damages for petitioner's acts which the Court concedes to have been finally adjudicated by the Kansas courts to have been done in accordance with Kansas law, puts in grave jeopardy conservation programs of the oil and gas producing states, such as Kansas. The decision establishes a precedent, if it is allowed to stand, for the federal courts in diversity cases effectively to nullify state conservation programs, not on the basis of any federal right, but on the basis of the federal courts' independent determination of what is "wrongful and actionable in the common law sense."

In this case, federal jurisdiction rests exclusively on diversity of citizenship, no federal right being asserted by the respondents. (R. 4-6) The decision of the case should therefore be determined by the law of Kansas. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). The federal courts should have no authority to override the decision of the highest court of Kansas, as to what the applicable law is. More especially, a federal court should not reopen a question decided by the highest court of Kansas in prior litigation between the same parties and reach a conclusion diametrically opposed to the state court's decision of that question.

This Court granted a writ of certiorari and reversed the decision of a Court of Appeals in conflict with the holding of a state Supreme Court, in *Forsyth* v. *Hammond*, 166 U.S. 506 (1897). In that case, the City of Hammond, by special statutory proceedings originally before a County Board of Commissioners and on appeal in an Indiana Circuit Court, had annexed unplatted land belonging to For-

syth. The Supreme Court of Indiana, in an appeal by Forsyth and others, held that the annexation was valid and in accordance with Indiana law. While the state proceedings were still pending, Forsyth brought suit in the federal court to enjoin the collection of taxes on the property in question by the City of Hammond. The federal trial court dismissed the bill, but the Court of Appeals reversed, overruling the contention that *Forsyth* was bound by the adjudication in the Indiana Supreme Court that the annexation was valid. The Supreme Court of the United States granted the petition for certiorari because of the conflict between the Court of Appeals and the Indiana Supreme Court "on the pivotal question of the validity of the annexation proceedings" (166 U.S. at 515).

This Court gave two basic reasons for reversing the decision of the Court of Appeals in Forsyth, both of which apply in this case. First, overruling the contention that the state proceedings were legislative in character and not judicial and therefore that *res judicata* would not apply, the Court held that Forsyth could not have a new and independent determination of the validity of the annexation, even though the form and cause of action in the federal court was different from that in the state courts (166 U.S. at 518):

> "Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

The second reason given by the United States Supreme Court for reversing the Court of Appeals was that the determination of the matter in controversy was peculiarly within the domain of state control and therefore the decision of the state authorities should be controlling (166 U.S. at 518):

> "These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling."

It is submitted that both of the reasons sustaining the decision in *Forsyth* are fully applicable here. Jackson Brothers cannot litigate again the question of injury to their property rights in the oil reservoir, since that question was decided against them by the Kansas Commission and the Kansas courts. The fact that the state proceedings were in the form of a complaint asking for a cease and desist order to stop Tidewater's water flooding, while the suit in the federal court is for damages claimed to have resulted from the same water flooding, makes no difference. The same "pivotal question" is involved and Jackson Brothers are not entitled to a second, independent determination of that same question.

Likewise, the determination of the extent of property rights in oil and gas reservoirs within the state and the effect of state regulatory statutes and administrative orders is a matter peculiarly within the domain of state control, where there is no claim of any violation of the United States Constitution or any conflict with any federal statute. The final determination by the state authorities of the lawfulness of the water flooding, as a means of preventing waste and protecting the correlative rights of all owners of interests in the oil reservoir, is and should be authoritative and controlling.

As the Court said in *Marrs* v. *City of Oxford*, 24 F.2d 541, 548 (D.C., Kansas, 1928):

> "The quality of the interest which the owner has in the oil underneath his property is, of course, determined by the laws of Kansas."

Likewise, it is settled law that the decision by state courts of questions relating to the meaning of state statutes and state administrative orders and their effect on property rights within the state is binding on the federal courts. *Lindsley* v. *Natural Carbonic Gas Company*, 220 U.S. 61 (1911); *Jones* v. *Prairie Oil & Gas Company*, 273 U.S. 195 (1927); *Bandini Petroleum Company* v. *Superior Court*, 284 U.S. 8 (1931); *Patterson* v. *Stanolind Oil & Gas Company*, 305 U.S. 376 (1939); *Ohio Oil Company* v. *Indiana*, 177 U.S. 190 (1900).

The law as settled in the cases we have cited above cannot, we believe, be seriously disputed. However, the Court of Appeals refuses to apply these rules of law, for reasons that are shown to be plainly erroneous when the opinion of the Court of Appeals is analyzed and its holdings are compared with the determinations of the Kansas Commission and Kansas courts in the prior litigation.

In substance, the two basic reasons given by the Court of Appeals for its decision are (1) the Court's assertion that the Kansas Commission did not decide the issue of the correlative rights of the parties, and (2) apparently in the alternative, the Court's holding that, in any case, the Commission could not make a binding determination of the "operative facts" upon which "tort liability" rests.

(1) The Court of Appeals is clearly wrong in holding that the Kansas Corporation Commission did not decide the question of the correlative rights of the parties. The Court of Appeals erroneously says (*infra* A28):

> "*On the question of the correlative rights of the parties*, as defined by its Rule 82-2-101, the Commission stated that correlative rights related *only* to the ratable withdrawal of oil and gas from a common reservoir, and since no question of ratable taking

was presented, *there was nothing for the Commission to decide.*"*

This crucial sentence in the opinion of the Court of Appeals is, we respectfully submit, a complete misinterpretation of the Memorandum Opinion of the Kansas Corporation Commission on the question of correlative rights. This is apparent from a consideration of the whole opinion of the Commission, as well as the part where the question of correlative rights is specifically decided.

In an earlier part of its opinion, after stating that Jackson Brothers asserted that Tidewater's acts were unlawful, in that they would cause "irreparable harm" to Jackson Brothers by "displacing with salt water the oil in the Bartlesville formation underlying their leases; by loss of production from wells on the lease; and by rendering valueless complainants' producing wells," the Commission states facts as to water flood projects which must be taken into account in determining the relative property interests of the different owners in the oil reservoir (R. 27):

> "Line injection wells are the normal pattern for water flood projects which seek to confine oil within the lease for production from a central well. In a water flood project, one water injection well will eventually flood every producing well in the reservoir. It must be assumed that the legislature was aware of the behavior of reservoir fluids in a repressuring project when the statute authorizing repressuring was enacted. Confining reservoir fluids to the boundaries of a lease would be impossible under natural physical laws."

Near the end of its opinion, the Commission asks the question, "What are the correlative rights involved?" It

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*Emphasis in this petition is supplied by us.

first answers by stating the way in which those rights must be determined (R. 30):

> "*The question of protection of correlative rights cannot be considered in a unilateral aspect.* The very nature of the consideration which must be accorded such question entails *a weighing of all interests involved* and rendering a decision which assures that no one producer is enriched to the detriment of other producers in the common source of supply."

The Commission then quotes the definition of correlative rights in its Rule 82-2-101, as follows (R. 30):

> "Correlative Rights shall mean that each owner or producer in a common source of supply is privileged *to produce therefrom only in such manner* or amount *as not to injure the reservoir to the detriment of others'* or to take an undue proportion of the oil or gas obtainable therefrom, *or to cause undue drainage between developed leases.*"

The Commission then says (R. 30-31):

> "There is no ambiguity in the language of this definition. The theory of collateral [correlative] rights relates to the withdrawal of gas or oil from a common reservoir in amounts disproportionate to the interests of lease owners.
>
> "The question of withdrawals from the common reservoir is not presented in this complaint involving the flooding of producing wells by water injected during a lawful water flood operation. In a water flood of this type the only way to prevent the movement of oil from lease to lease and *thus protect correlative rights* is to place the injection wells on the lease boundary.
>
> "Commission jurisdiction in matters involving production of oil and gas is by statute limited to the prevention of waste and *the protection of correlative*

> *rights.* No waste of natural resources *nor injury to correlative rights having been shown*, it appears that the instant proceeding presents no justificable matter for action by this Commission The complaint should therefore be dismissed and the order temporarily suspending defendant's repressuring authority should be rescinded."

Consideration of the Commission's opinion quoted above shows that the statement in the opinion of the Court of Appeals, that the Commission stated that correlative rights related *only* to the ratable withdrawal of oil and gas from a common reservoir, is plainly incorrect. The Commission *does* state that the theory of correlative rights relates to proportionate withdrawals, but the Commission *does not* state that that is the *only* question involved in determining correlative rights. The Commission's rule defining correlative rights shows on its face that it relates not only to the *amount* of withdrawals so that no producer shall take an undue proportion of the oil and gas, but also to the *manner* of production so as not to injure the reservoir to the detriment of others or to cause undue drainage between developed leases. After saying that the question of ratable withdrawals is not involved in this case, the Commission immediately turns to the other part of the rule and specifically finds that in a water flood of this type "the only way to prevent the movement of oil from lease to lease and thus *protect correlative rights* is to place the injection wells on the lease boundary." Thus the Commission plainly *did* decide against Jackson Brothers and in favor of Tidewater on the question of correlative rights as it was raised by the complaint of Jackson Brothers, which was directed not against the amount of withdrawal but against the manner of production by water flooding.

The Court of Appeals also misconstrues and misapplies the following sentence in the Commission's Opinion (R. 30-31):

> "No waste of natural resources nor injury to correlative rights having been shown, it appears that the instant proceeding presents no justiciable matter for action by this Commission."

Plainly what the Commission was saying was that Jackson Brothers had failed to show that Tidewater's water flooding was causing either waste of natural resources or injury to correlative rights, and therefore no case had been established warranting action by the Commission to stop Tidewater's water flooding. The Commission was not stating that it had nothing to decide on the issue of correlative rights any more than it was refusing to decide the issue of waste. Both issues are referred to in the quoted sentence in the same way and both issues are decided against Jackson Brothers.

The Kansas courts on appeal had no difficulty whatever in construing the opinion of the Corporation Commission to mean that the Commission decided the issue of injury to correlative rights against Jackson Brothers. The District Court of Greenwood County, Kansas, expressly said that Jackson Brothers "have now had their day in court and *had a determination of their correlative rights*" and that Court held that "the decision of the State Corporation Commission should be affirmed in whole." (R. 33)

Equally clearly the Supreme Court of Kansas construed the opinion of the Corporation Commission to mean that there had been a determination of correlative rights by the Commission. The Supreme Court construes the Commission's rule to include not only the prevention of

the taking of an undue proportion of oil by one producer but also production in such way as to cause "undue drainage between developed leases." It points out that where water flooding projects are being conducted for secondary recovery of oil, the Commission held that "the only way to prevent movement of oil from one lease to another and *protect correlative rights* is to place input wells along the boundary between." (348 P.2d at 616). The Supreme Court of Kansas says that the Commission dismissed the complaint and rescinded the temporary cease and desist order because the Commission concluded that no waste of natural resources or "injury to correlative rights" was shown. (348 P.2d at 616)

The Supreme Court of Kansas not only approved the findings of the Commission as being based on substantial competent evidence, but also approved as "correct" the decision based on those findings. (348 P.2d at 617)

Thus in fact the United States District Court could not decide that damage was being done to Jackson Brothers' correlative rights by Tidewater's water flooding except by making findings in irreconcilable conflict with the findings of the Commission. In a way which is markedly inconsistent with what it had previously said, to the effect that the Commission stated that there was nothing for it to decide on the issue of correlative rights, the Court of Appeals later in its opinion, with reference to the claim by Jackson Brothers that there had been an unreasonable interference with their property rights, "resulting in actual and substantial damages," admits that the findings of the United States District Court "are, to be sure, irreconcilably inconsistent with the conclusive administrative findings to the effect that the water flooding operations were carried on *in a lawful manner*." (*infra* A36). Under the

definition of "correlative rights," as set out in the Commission's rule, plainly the water flooding operations could not be conducted in "a lawful manner" if they caused damage to the reservoir to the detriment of Jackson Brothers or caused undue drainage of oil between leases. Therefore, obviously the findings of the United States District Court are in irreconcilable conflict with the findings of the Kansas Commission.

(2) The Court of Appeals, as a second and apparently alternative reason for its decision, denies the binding effect of the Commission's determination approved and affirmed by the Kansas courts, on the ground that the Commission is not "empowered to determine Tidewater's tort liability," (*infra* A32) and that therefore the Commission cannot "deprive a tort claimant of his day in court" on the issue of tort liability "by conclusive adjudication of the operative facts upon which his claim must rest." (*infra* A32) Near the end of its opinion the Court summaries its conclusion by saying that while Tidewater's acts "were committed under color, and in accordance with Kansas law" and were "lawfully undertaken and lawfully done in the interest of conservation," nevertheless they were "wrongful and actionable in the common law sense." (*infra* A39)

Of course it is true that the Commission has no authority to give relief in the form of a judgment for damages. The Commission in its opinion twice expressly says that it is not a proper forum in which to seek damages. (R. 27, 30) The Commission can only order that the water flooding be stopped or modified, if it causes either waste or injury to the correlative rights of other owners in the same reservoir. But this does not mean that there is any difference between the pivotal question (or, as the Court of Appeals says, the "operative facts") involved in

this suit for damages and the question decided in the prior litigation where Jackson Brothers sought to obtain a cease and desist order. The basic question in both cases is whether Jackson Brothers' correlative rights have been injured. The Kansas courts have adjudicated that the Commission had jurisdiction to decide, and that it correctly decided, that question. That adjudication should be final. Otherwise, effective regulation of oil and gas production by duly authorized state agencies will be rendered impossible.

The authorities cited by the Court of Appeals with reference to an "incidental" determination of a matter by a tribunal which has no jurisdiction to determine the matter directly (*infra* A32) have no application in this case. The matter of injury to Jackson Brothers' property rights in the oil reservoir was *directly* raised in and *directly* decided by the Kansas Corporation Commission; and the Kansas courts, in affirming and approving the Commission's decision, held that the Commission had jurisdiction to pass on this question and that it had correctly decided it.

An analogous case is *City of Hastings, Nebraska, v. Kansas-Nebraska Natural Gas Company*, 226 F.2d 419 (8th Cir., 1955). In that case suit was brought by the gas company against the City for the recovery of amounts due for gas sold to the city under a contract. In earlier litigation, the city had sought relief from the Federal Power Commission to eliminate from the contract the clause upon which the gas company later brought suit, but the Federal Power Commission had ruled against the city and its order had been affirmed upon appeal by the Court of Appeals for the District of Columbia Circuit. While liability for damages was not the issue in the prior litigation, the question of the validity of the clause in the

contract was held to be conclusively determined in the first litigation and the city was denied any right to litigate again the same question (226 F.2d at 422):

> "The principal questions which the City raises and seeks to have us determine are ones which were presented or involved in the Federal Power Commission's evaluation of the situation and on the judicial review had of the propriety of the Commission's concepts and conclusions as a basis for its order. Upon these questions, the City has had its day in court, and it is without right to ask for any further consideration of them."

Since the order of the Kansas Corporation Commission has been reviewed and upheld by the Supreme Court of Kansas, and since in upholding the order the Kansas Supreme Court construed it to be a determination by the Kansas Corporation Commission in accordance with Kansas law that the correlative rights of Jackson Brothers had not been injured by the water flooding in question, the question of whether the Corporation Commission had jurisdiction to make such a determination is foreclosed. Certainly the Kansas Supreme Court had jurisdiction to determine these matters in the proceeding brought by Jackson Brothers for judicial review of the Commission's order. In *Detroit & Mackinac Railway Company* v. *Michigan Railroad Commission*, 235 U.S. 402 (1914), an order of the Michigan Railroad Commission had been upheld on appeal by the Supreme Court of Michigan. Thereafter a suit was brought in the federal court to enjoin rates fixed in the Railroad Commission's order. The court below, and the Supreme Court on appeal, held that the petitioner was concluded by the judgment of Michigan court, whether or not the Michigan Commission had jurisdiction to decide the questions raised in the federal court. On this point, the Court said (235 U.S. at 406):

> "Of course, when once it is established that the bill in the state court was an ordinary though statutory judicial proceeding, we must assume that the plaintiff was bound to present its whole case. Calaf v. Calaf, 232 U.S. 371, 374. Whether the commission exceeded its jurisdiction or not, as it purported to make orders the Michigan court had jurisdiction, and the appellant is bound by its decree."

The Court of Appeals mentions the fact that no compulsory unitization project is involved in this case (*infra* A33), but it incorrectly draws the conclusion from this fact that we do not have here a case where the common source of supply is subjected to legalized regulation and where the relative rights of interested parties are determined and constitutionally protected. The Kansas statutes and the rules of the Kansas Corporation Commission affirmatively show beyond any doubt that the common source of supply is subjected to legalized regulation and that the relative rights of interested parties in the common source of supply of oil must be determined and must be constitutionally protected before water flooding operations can, under Kansas law, be authorized by the Corporation Commission.

The decision of the Court of Appeals that a second and independent determination of the same questions can be obtained by Jackson Brothers by going into the federal courts and there suing for damages can only lead to confusion and conflicts in the application of state laws relating to conservation. We submit that the language of the Court in *Burford* v. *Sun Oil Company*, 319 U.S. 315, 333 (1943), is apposite here:

> "The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts

is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts."

There is no question in this case of the taking of one owner's property for the benefit of another. This is not a case similar to eminent domain proceedings. Under the regulations of the Corporation Commission, the water flooding *must* be so conducted as not to harm the reservoir to the detriment of others or to cause undue drainage of oil; otherwise it cannot be approved. Of course the confinement of oil or water within property boundary lines is a physical impossibility, and the net effect of the movement of fluids within the reservoir which inevitably results from water flooding must be taken into account. This is not "a unilateral operation," as the Court of Appeals says. (*infra* A33) On the contrary, as the Commission expressly says in its opinion (R. 30), "the question of correlative rights cannot be considered in a unilateral aspect," and there must be a weighing of "all interests involved" before a water flooding project will be authorized or approved.

The reference by the Court of Appeals (*infra* A33) to Kansas G.S. 55-121 only serves to confuse the issue. That statute* makes it unlawful to permit salt water, oil,

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*"55-121. *Salt water, oil or refuse from wells; prevention of escape.* It shall be unlawful for any person, having possession or control of any well drilled, or being drilled for oil or gas, either as contractor, owner, lessee, agent or manager, or in any other capacity, to permit salt water, oil or refuse from any such well, to escape by overflow, seepage or otherwise from the vicinity of such well, and it shall be the duty of any such person to keep such salt water, oil or refuse safely confined in tanks, pipe lines or ponds, so as to prevent the escape thereof: *Provided, however,* That this act shall not be construed to apply to the

or refuse to escape by overflow, seepage, or otherwise. Cases where liability was based on a violation of that statute are obviously not in point. It has no application to water flooding operations, where water is injected under pressure into an oil producing reservoir for the purpose of pushing to producing wells oil which otherwise would be left in the reservoir. The Court of Appeals evidently failed to note that the Kansas Corporation Commission referred to that statute and expressly held that it related to the confinement of salt water encountered during drilling operations and is inapplicable to repressuring activities (R. 28):

> "G.S. 1955 Supp., 55-121 and Commission Rule 82-2-121 relate to confinement in tanks, pipe lines or ponds of salt water encountered during the drilling of an oil or gas well; they are not applicable to lawful repressuring operations under G.S. 1949, 55-133, and Commission Rules 82-2-500 et seq. where salt water is injected into producing formations under authority duly granted as there provided."

This holding was mentioned and approved by the Supreme Court of Kansas in its opinion. (348 P.2d at 615, 617)

While it is interesting to speculate what the common law rule of liability would be in a case where a water flooding project had *not* been approved by the state regulatory agency and the state courts, the decision of that question is unnecessary in this case and the whole discussion by the Court of Appeals of cases and other authorities bearing on that question is irrelevant.

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escape of salt water, oil or refuse because of circumstances beyond the control of the person in the possession or control of such well and under circumstances which could not have been reasonably anticipated and guarded against."

In this case there *has* been an adjudication in favor of Tidewater's water flooding program by the Kansas Corporation Commission and the Kansas courts in determining a specific complaint made by Jackson Brothers asking that the water flooding should be stopped because, they claimed, it was causing irreparable damage to their property. None of the cases cited by the Court of Appeals have to do with a second attempt to litigate the issues decided in a prior case between the same parties where the water flooding had been approved by the proper state authorities having control over the water flooding operations. All of the discussion by the Court of Appeals as to whether the theory of liability should be negligence, or trespass, or nuisance, or absolute liability is beside the point. Here it has been conclusively determined in prior litigation, that the water flooding does not cause injury to respondents' property rights in the reservoir, and in the absence of such injury there can of course be no recovery of damages on any theory.

CONCLUSION

The question involved is one of vital importance to the relations between the lower federal courts and the state conservation agencies and state courts. The Court of Appeals has refused to give binding effect to the prior final adjudication by the Kansas courts in litigation between the same parties, of the same pivotal question on which liability must be determined in this case. It has refused to follow the final decision as to the meaning of the Kansas statutes and administrative orders by the Kansas Supreme Court. Apparently it opens the way for the establishment by the federal courts of a body of rules of common law liability for damages which necessarily con-

flict with and would substantially defeat the legislative policy of states adopting statutes authorizing and regulating methods of secondary recovery of oil and gas.

It is respectfully submitted that this petition for a writ of certiorari should be granted, and that the judgments of the lower courts should be reversed with directions to enter judgment for petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As Jackson Brothers, Plaintiffs, vs. TIDEWATER OIL COMPANY, Defendant.	Civil Action No. W-1601

Findings of Fact and Conclusions of Law

FINDINGS OF FACT.

I.

This action is brought by the plaintiffs, George E. Jackson and Karl B. Jackson, who are residents of Eureka, Kansas, and citizens of the State of Kansas, claiming actual and punitive damages in a sum exceeding $10,000.00, exclusive of interest and costs, for injury to a producing oil and gas property owned by them. The defendant, Tidewater Oil Company, is a corporation organized and existing under the laws of the State of Delaware, and that Company maintains its principal offices outside the State of Kansas.

II

The plaintiffs are the owners and operators of a producing oil and gas lease, hereinafter referred to as the Barrier lease, under date of April 13, 1954, the productive portion involved here being confined to that part of the lease covering the following described land:

All that part of the Southeast Quarter of Section 3, Township 26 South, Range 8 East, lying North of U.S. Highway 54, Greenwood County, Kansas.

The Barrier lease is offset on the East and South by the Hull "B", Stevenson, Hull "C", Rice, and Hull "D" leases, all of which are productive of oil and are operated by the defendant.

III.

The plaintiffs acquired from the same landowners a prior lease covering the tract described above in the year 1952. In that year they drilled and set surface pipe at the present location of the No. 1 well. However, for financial reasons, plaintiffs were unable to drill the well on down for two years. In April of 1954 after the acquisition of the second lease, the plaintiffs drilled the No. 1 well and completed it as a producing well in the Bartlesville formation. This well initially produced 50 barrels of oil a day, with virtually no water. The well produced approximately 20,000 barrels of oil before it was flooded out by salt water.

IV.

By approximately July 1, 1956, the plaintiffs had drilled eight additional wells, a total of nine wells on their Barrier lease. All of the wells were completed as producing wells making approximately the following quantities of oil:

Well 1—50 barrels per day.
Well 2—50 barrels per day.
Well 3—65 barrels per day.
Well 4—90 barrels per day.
Well 5—60 barrels per day.
Well 6—50 barrels per day.
Well 7—40 barrels per day.
Well 8—42 barrels per day.
Well 9—90 barrels per day.

V.

Before the defendant began injecting water immediately offsetting the Barrier lease most of plaintiffs' wells produced little water, except Well No. 5 and Well No. 6, which together produced approximately 20 barrels of water per day. During this period the Barrier wells produced oil at rates which might be expected of wells completed for primary production. In the drilling, testing, completing and equipping of the first nine wells on the Barrier lease, the plaintiffs invested approximately $170,00.00.

VI.

The oil produced from the Bartlesville sand is found at depths of approximately 2,500 feet. The Bartlesville sand in this area is found in long, narrow offshore sand bars, or shoestring formation, and is known as the Blankenship-Sallyards field. The plaintiffs' Barrier lease, prior to 1954, was an unexplored portion or extension of this sand bar system. The Blankenship-Sallyards field extends in a Northeast-Southwest direction. Original development began in this field in 1917. The field was rather well developed and defined in the 1920's and early 1930's and the wells were produced by primary recovery methods for twenty to thirty years before repressuring was undertaken. In 1949 defendant commenced waterflooding in the area and from 1949 to 1952 Tidewater's flooding operations were confined to an area Southwest of the Barrier lease and did not extend onto the Hull "C" lease, which adjoins the Barrier lease to the South. Initial development was on a five spot pattern. In 1953 flooding was commenced on a lease lying to the Northeast of the Barrier property approximately one mile and a half away. It was the defendant's plan to gradually work toward the center of the Bartlesville sand bar system in this area and include in the flood approximately 100 additional acres per year.

VII.

When plaintiffs first acquired the Barrier oil and gas lease and planned to commence the drilling of a well on it they discussed their intentions with McPhail and Heinerman, the Project Engineer and Field Superintendent for Tidewater. In these conversations plaintiffs were told they might expect to get one small well in the extreme Southeast corner of their property. At the time of this conversation in the Spring of 1952 there was no mention of any proposed line of salt water input wells or any proposal to inject salt water against plaintiffs' property line. Moreover, at the time of this conversation the defendant did not have an order from the Kansas Corporation Commission authorizing it to conduct water flood operations on that portion of the Bartlesville reservoir and on the leases owned by the defendant adjacent to the Barrier property.

VIII.

Waterfloodir.g operations in the area which includes the land involved in this action were authorized by an order of the Kansas Corporation Commission issued under date of July 29, 1953. Tidewater did not give the plaintiffs notice of the application for or granting of this order.

IX.

Prior to 1955 Tidewater had substantially followed an established plan to place under flood approximately 100 additional acres each year. However, in 1955 and 1956, after plaintiffs had discovered and began to develop commercial production on the Barrier lease, the defendant almost doubled the rate at which it expanded its flood project and as a result reached the boundaries of the plaintiffs' property almost two years earlier than would have otherwise been the case.

X.

On May 15, 1956, the defendant wrote the plaintiffs proposing that the parties jointly inject water along the boundary of the Barrier lease and the defendant's Hull "C" lease, which joins the Barrier property on the East and South. The proposal was that plaintiffs convert two producing wells to injection wells and that the defendant convert one producing well to an injection well and drill an additional injection well at its cost. Two more injection wells would be drilled along the boundary at the joint cost of plaintiffs and defendant. Tidewater would furnish the injection water which the plaintiffs would purchase for their wells at a cost of 2¢ per barrel. This was the first notice by Tidewater to the plaintiffs that it proposed or intended to inject salt water along the boundary of the Barrier tract offsetting the plaintiffs' producing wells.

XI.

Shortly after this written proposal two engineers for the defendant, Haugh, the Division Engineer, and McPhail, the Project Engineer, called upon the plaintiffs and outlined substantially the same proposal contained in the letter. At this conference plaintiffs were told that the defendant would have to maintain control over the rates of injection in the line input wells. In making this proposal the defendant's Division Engineer had in mind injection rates in joint or cooperative line wells of 150 to 200 barrels per well per day; but when wells W-16, W-17 and W-18 were completed the defendant commenced injecting water at better than twice those rates.

XII.

The plaintiffs computed and determined that it would cost them approximately $100,000.00 to go into the joint water injection project and formed the opinion that since

their lease was being produced on primary recovery, rather than secondary recovery, the injection of water would probably damage rather than benefit them. The joint injection project proposed by the defendant would, in fact, have damaged rather than benefited the plaintiffs' lease and was unreasonable and unfair in view of the fact that the plaintiffs were engaged in primary recovery from their lease and would have been called upon to make large and unnecessary expenditures without control over the rates of water injection. The plaintiffs told Haugh and McPhail that they were producing their lease in the primary stage of recovery and that they could not afford the additional investment required to go into the proposed injection project. They requested that the defendant give them two years to produce as much of the primary oil as possible before it started flooding along the boundary of the Barrier property.

XIII.

At this conference it was indicated to the plaintiffs that the defendant might be interested in purchasing the Barrier property if the plaintiffs could not afford to join in the line injection project. Under the pretense of making an engineering study of the Barrier wells with a view to making the plaintiffs an offer to purchase their property, the defendant obtained copies of the electric logs on all of the plaintiffs' wells. After it had received the logs the defendant sent word through McPhail that it was not Tidewater's policy or practice to make an offer to purchase in such circumstances.

XIV.

Shortly after this conversation, and about June 24, 1956, without further notice to the plaintiffs, the defendant moved in a rotary rig and commenced drilling salt

water input well W-16, directly East of the plaintiffs' #1 well, and within approximately 20 feet of the boundary line. Upon completion of W-16 the rig was moved North to a location immediately offsetting the plaintiffs' well #8 and within twelve feet of the property line, where injection well W-17 was drilled. Upon the completion of that well the rig was again moved North approximately the same distance, and within twelve feet of the plaintiffs' property line, where well W-19 was located and drilled. These wells were deliberately located by the engineer and the employees of the defendant as close to the plaintiffs' boundary line as it was possible to get a rotary rig.

XV.

Water injection was started in wells W-16 and W-17 on July 20, 1956, and in W-18 on August 8, 1956. The first water injected in W-16 migrated across the boundary and into the plaintiffs' #1 well, and within a matter of hours the well was virtually flooded out.

XVI.

When the water injected by the defendant commenced to appear in the plaintiffs' #1 well, the plaintiffs got in touch with the defendant's field engineer, McPhail, and told him that their well was being flooded out and asked that the injection be shut down. McPhail refused to shut down the water injection and told the plaintiffs, in substance, that he had specific orders from higher authorities in Tidewater to put the water in the injection wells and that they would not be shut in, regardless of the effect on the plaintiffs' wells. McPhail confirmed, by his own inspection, the fact that the plaintiffs' #1 well had been flooded out by water injected in W-16. Following the request of the plaintiffs that water injection be

shut in. McPhail communicated the situation to his superiors in Tidewater. The matter was discussed between Haugh and Berg, the engineers in charge of the production operations of the company and ultimately responsible for this project. They decided, and gave instructions, that injection should be continued, regardless of the effect on the plaintiffs' wells. In fact, the responsible agents and engineers of the defendant company did not even seriously consider the plaintiffs' request that injection along the boundary line be stopped in view of the damage being done to their #1 well.

XVII.

Plaintiffs' well #8, which the defendant offset with injection well W-17, was a new well drilled and completed just prior to the drilling of Tidewater's line injection wells. The well was completed without hydrofrac and produced between 40 and 45 barrels of oil per day naturall , with just a trace of water. Within approximately six weeks after water injection was commenced along the property line, well #8 began to make appreciable quantities of water and its ability to produce oil declined correspondingly. In the first few days in September, the defendant increased its rate of injection in W-17 (which previously had been in the neighborhood of 300 barrels a day) to rates of injection varying between 400 and 600 barrels per day. These rates were maintained for approximately two weeks, during which time the plaintiffs' well #8 was completely flooded out and rendered incapable of producing oil. After the well was flooded out the defendant reduced its water injection rate in W-17 approximately 400 barrels a day.

XVIII.

At the time wells W-16, W-17 and W-18 were located and drilled, and before water was injected in them, the engineers and employees of the defendant in charge of the project, knew and assumed that the water which they proposed to inject in these wells along the boundary of the Barrier tract would migrate across the line and under the plaintiffs' property and would probably flood out some of the plaintiffs' producing wells very quickly. The probability of damage to the plaintiffs' property was anticipated by the defendant to such an extent that before the first salt water injection well, W-16, was drilled, the defendant's field engineer, McPhail, went to Wichita, Kansas, to discuss the situation with agents of the Kansas Corporation Commission. Upon his inquiry, agents of the Commission told McPhail that while Tidewater did hold an order from the Commission which would allow it to conduct water flooding operations on its leases adjoining the Barrier lease, they would not commit the Commission on questions concerning damage to the plaintiffs' wells.

XIX.

The defendant's injection well W-16 gradually declined in its ability to take water injected into it and on September 29, 1956, the defendant shot the well with 55 quarts of nitroglycerin placed in the Bartlesville formation. When this shot was exploded in well W-16 the force of the explosion erupted in the plaintiffs' #1 well, causing that well to blow gas and water through the wellhead for several minutes. The defendant's field superintendent, Heinerman, concluded that there was direct communication between the plaintiffs' #1 well and the defendant's W-16 injection well. Heinerman communicated the incident to Haugh and McPhail. Regardless of the fact that

direct communication between the W-16 well and the plaintiffs' lease had been established, when W-16 was cleaned out after the shooting, water injection was commenced at rates varying from 300 to 400 barrels a day.

XX.

In March of 1958, the defendant attempted again to fracture well W-16 by pumping fluid into the well at the maximum pressure the casing in the well could withstand. This treatment was unsuccessful. A month later, in April of 1958, the defendant ran a Lane-Wells vibro-frac tool in the well, which is an explosive charge designed to fracture the formation. This instrument was set off in precisely the same ten-foot interval of the Bartlesville sand in which the plaintiff's No. 1 well had been completed. After these treatments, water injection was again resumed in W-16.

XXI.

At the time injection wells W-16, W-17 and W-18 were drilled and completed by the defendant, and at the time water injection in those wells was commenced, the defendant did not have any producing wells drilled or completed which could be considered flood return or recovery wells for W-16, W-17 and W-18, or for that part of the Hull lease on which they were located.

XXII.

Commencing in March of 1955, the defendant drilled and completed a producing oil well identified as well No. 36 on its Hull lease immediately South of the boundary of the Barrier lease, at a location which approximately offsets the plaintiffs' No. 3 well. In August of the same year the defendant commenced and later completed producing

well No. 38 (now W-26) along the same boundary and as an approximate direct offset to the plaintiffs' well No. 5. From completion until October, 1958, these two wells were produced as oil wells by the defendant. On about October 15, 1958, these wells were converted by the defendant to water injection wells. Since that time the defendant has injected water in these wells at about the same rates as water had been injected in wells W-17 and W-18. Because well W-16 did not take water in the desired quantities the defendant also re-completed an old well known as well No. 30 (Now W-22) as a salt water injection well. That well is located within 150 to 200 feet of well W-16 and opposite the Southeast corner of the plaintiffs' lease. Water injection in this well was commenced July 15, 1958. Since that date the defendant has injected water in W-16 and W-22, both offsetting the Southeast corner of the plaintiffs' lease, at the maximum rates at which the plant pressure would force the water into the wells.

XXIII.

From the commencement of water injection in the wells along the plaintiffs' property line until January 1, 1960, the defendant had injected the following quantities of salt water:

Well W-18	—	294,338 barrels
Well W-17	—	318,059 barrels
Well W-16	—	58,834 barrels
Well W-22	—	92,330 barrels
Well W-25	—	90,129 barrels
Well W-26	—	91,202 barrels

In all six wells the defendant has injected a total of approximately 945,000 barrels of water.

In 1956 and 1957, when injection of water along the property line was first started and the plaintiffs' wells were

being flooded out and the lease extensively damaged, the defendant injected water in the three wells along the east boundary of the plaintiffs' property in quantities ranging from 800 to 1400 barrels per day. During this period the defendant consistently injected water in wells W-17 and W-18 at average rates of more than 325 barrels per well per day.

Throughout the entire period the defendant has injected water in wells W-16, W-17, W-18, W-25 and W-26 at rates substantially in excess and frequently twice as high as the average rates of injection in similar wells on the surrounding property, the Hull and Stevenson leases. In the case of wells W-16 and W-22, which had a limited capability to accept water, the defendant injected water at the maximum rate the plant pressure would force into the wells.

XXIV.

On the Stevenson lease operated by the defendant (which adjoins the Hull lease on the East), the defendant operates eleven salt water injection wells and twelve producing wells in the Bartlesville formation. During the first six months of water injection on this property the defendant gradually increased its total water injection in all of the wells on the lease from approximately 300 barrels per day to 1400 barrels per day for the entire lease. Thereafter, for the ensuing year the defendant injected from 800 to 1600 barrels per day in a total of eleven injection wells, for an approximate average rate of injection over this period of 1200 total barrels per day for the entire property, or about 110 barrels per input well per day.

As a result of these moderate injection rates the production of oil from the lease was increased substantially throughout the first year of flooding operations; and the

production of water was not seriously increased, but, on the contrary, remained almost constant throughout the first year of waterflood operations. The operation conducted on the Stevenson lease was considered by the defendant to be a very successful water injection program.

XXV.

On the plaintiffs' Barrier lease, however, the rate of water production increased substantially and very rapidly shortly after the commencement of water injection by the defendant along the border of the property. There was no permanent appreciable increase in oil production from the Barrier lease attributable to the effects of water injection or waterflood action; and the oil production from the lease commenced to decline except for the addition of production from new wells drilled on the interior of the lease and placed on production. Within a relatively short period of time the rate of water production from the Barrier lease reached such proportions that from the commencement of injection until January 1, 1960, the plaintiffs' Barrier lease has produced 615,355 barrels of salt water. In December of 1959, the Barrier lease was producing slightly less than 200 barrels of oil per day and approximately 1240 barrels of salt water per day.

XXVI.

For about six months, from November of 1956 to April of 1957, the injection of water by the defendant in W-16, W-17 and W-18 was enjoined as the result of proceedings brought by the plaintiffs before the Corporation Commission of the State of Kansas and in the District Court of Greenwood County, Kansas. During this period the production of water from the Barrier lease commenced to decline and Barrier wells No. 1 and No. 8, which had been

completely flooded out, commenced to make small quantities of oil. However, when the order enjoining the injection of water was lifted the defendant immediately commenced injection in wells W-16, W-17 and W-18 at extraordinarily high rates and immediately flooded out Barrier wells No. 1 and No. 8 again.

XXVII.

Shortly after water injection was resumed in wells W-16, W-17 and W-18, about April 19, 1957, the defendant exceeded the authority of its flooding order from the Kansas Corporation Commission by injecting water at rates in excess of 1,000 barrels per well per day as follows:

Date	W-16	W-17	W-18
April 21, 1957	1,008 bbls.	1,411 bbls.	1,331 bbls.
April 22, 1957		1,100 bbls.	1,100 bbls.
April 27, 1957	1,150 bbls.	1,483 bbls.	1,117 bbls.

Immediately when water injection was resumed, wells No. 1 and No. 8 on the Barrier lease were completely flooded out and never again produced oil; and the production of water from the lease increased rapidly.

XXVIII.

The Court finds that the defendant has injected water at unreasonable and excessive rates in the wells located along the boundary of the Barrier lease. Moreover, these unreasonable and excessive rates of water injection were instituted and maintained by the defendant deliberately and with the knowledge that the Barrier lease and the wells located thereon would be adversely affected.

XXIX.

The rates at which water has been injected along the plaintiffs' property line were unreasonable and improper

when compared to the rates of water injection maintained by the defendant on neighboring leases and when viewed in the light of the damage inflicted on the plaintiffs' wells and property in contrast to the benefits realized on the Stevenson lease. The Court finds, too, that the injection of water at such high rates was especially unreasonable since the injection wells were deliberately located as close as possible to the property line and immediately opposite and within less than 100 feet of the two of the plaintiffs' wells.

XXX.

The greatest part of the water injected by the defendant in the injection wells along the perimeter of the Barrier lease has migrated onto the Barrier lease and has been produced through the plaintiffs' wells located thereon. To January 1, 1960, the Barrier lease has produced a total of approximately 650,000 barrels of salt water and of that amount approximately 472,000 barrels had been produced in the last calendar year. The rate of water production from the Barrier lease will not decrease appreciably as long as Tidewater continues to inject water in its wells along the boundary of the plaintiffs' lease. Practically all of the water produced on the Barrier lease to the time of trial has been salt water injected by the defendant along the boundaries of the lease, and since the commencement of injection, the plaintiffs have spent approximately $57,650.00 in lifting, or producing this salt water through their wells located on the Barrier lease.

XXXI.

As the direct result of the defendant's injection of water around the perimeter of the Barrier property, the plaintiffs' well No. 1 and No. 8 have been completely and

permanently flooded out. Well No. 6 was temporarily abandoned in August of 1959, because it was unable to produce oil in sufficient quantities to pay the cost of operation; well No. 5, at the time of trial, was being operated at below the economic limit of production; and Barrier wells Nos. 2, 3, 4, 7 and 9, were, at the time of trial, producing such small quantities of oil and large quantities of water as to be fast approaching the economic limit of production or the point at which the cost of operating the wells will exceed the revenue. After the commencement of injection around the perimeter of the lease by the defendant, the plaintiffs, at various dates, drilled and completed six additional wells (numbered 10, 11, 12, 15, 18 and 19) in the interior of that portion of their lease affected by the defendant's water injection. By the time of trial, these six wells in the interior of the lease were producing over 75% of all of the oil produced from the lease; and as a result of the defendant's injection of excessive quantities of salt water in the wells around the boundary of the Barrier tract, it will be necessary for the plaintiffs to continue to produce their perimeter wells beyond the economic limit of production in order to keep the defendant's water from flooding out the producing wells in the interior of the lease.

XXXII.

The geologists and electric log engineers produced as witnesses by both plaintiffs and defendant are in substantial agreement as to the shape and size and characteristics of the reservoir underlying the Barrier tract. Those experts, together with the petroleum engineers called by both plaintiffs and defendant, are in substantial agreement as to the total volume of the reservoir available to hold fluids and gases to be produced from the Bartlesville sand under the Barrier lease. There is, however, a sharp con-

flict in the testimony of the petroleum engineer called by plaintiffs and the petroleum engineer called by the defendant as to the amount of recoverable oil which was in place under the barrier tract in 1954, when the plaintiffs' first well penetrated the reservoir; and effect of the defendant's water injection along the boundary of the tract. The Court finds that the testimony of the petroleum engineer Van Slyke, called as a witness by the plaintiffs, is the most credible and should be accepted by the Court as correct.

XXXIII.

Specifically, the Court finds that at the time the reservoir was penetrated by plaintiffs' No. 1 well, there was approximately 677,800 barrels of gross stock tank oil in place under the lease and recoverable through the wells ultimately drilled by the plaintiffs on the property. That amount of oil would have been recovered by the plaintiffs in their operations for primary and secondary recovery without the interference of water injected by the defendant along the boundaries of the property. Had the plaintiffs been permitted to produce and operate their lease without such interference, they would have realized an ultimate operating profit of $1,549,400.00.

XXXIV.

As the direct result of the injection by the defendant of salt water in the wells located by it along the boundary of the Barrier tract, the plaintiffs will, in fact, produce only 477,000 gross barrels of oil from their wells on the Barrier lease, and the plaintiffs will lose, or be unable to produce, approximately 192,000 net barrels of oil which otherwise would be recovered by them. The total operating profit which will actually be realized by the plain-

tiffs will, as a result of the activities of the defendant, be reduced to $982,700.00, a loss of $620,700.00 from what would otherwise be realized as operating profit. This loss is and will be the result of increased equipment and operating expenses resulting from the necessity of lifting and disposing of excessive quantities of water injected by the defendant; the loss of fuel for the pumping wells by watering of natural gas which the wells once produced; the acceleration of the time when the economic limit of production from the wells on the Barrier property will be reached; the destruction and loss of producing wells on the Barrier property; and the loss of substantial quantities of recoverable oil under the Barrier lease as a result of being by-passed or watered off in the reservoir by the salt water injected by excessive rates by the defendant.

XXXV.

When the Bartlesville reservoir underlying the Barrier lease was penetrated by the first well or wells drilled by the plaintiffs on the property, that reservoir was substantially capable of producing large and profitable quantities of oil without waterflooding the reservoir. To some extent the reservoir pressure under the Barrier lease may have declined as a result of production on adjacent property; but the pressure decline was not sufficient to seriously interfere with the ability of the lease to be profitably produced by primary recovery methods.

XXXVI.

The principal reason or purpose of the defendant for locating its injection wells so close to the boundary of the plaintiffs' property and maintaining such high rates of injection was to form a water block and render it impossible for the plaintiffs to recover or produce oil from under

the Hull lease adjoining the Barrier lease. In other words, the defendant's principal objective was to prevent any migration of oil to the Barrier lease; not to repressure or waterflood the Hull lease.

XXXVII.

The defendant intends to and will continue to inject water around the perimeter of the plaintiffs' lease at such rates as it sees fit to put it in. The ultimate damage or injury to the plaintiffs' oil and gas leasehold estate and the wells located thereon can be accurately estimated on the basis of continued water injection by the defendant and injury and the damages so assessed are determinable and permanent.

XXXVIII.

There is no established custom or practice in the industry of injecting water along lease boundary lines to prevent the migration of oil where there is no agreemen between the adjoining lease operator and where, as in this case, one of the operators is engaged in primary recovery operations and the other in secondary recovery or repressuring operations, and there is certainly no custom or practice of drilling injection wells so close as to flood out new commercial oil wells belonging to an adjoining lease operator.

XXXIX.

It would have been possible and practical for the defendant to have protected the Hull "C" lease from drainage by drilling and completing producing wells rather than salt water injection wells along the boundary. When the wells on either side of the line had depleted the reservoir which would have been accomplished rather quickly,

water injection could have been undertaken by both parties cooperatively without extensive damage to the plaintiffs. However, even with injection wells created along the line, if moderate injection rates had been maintained by the defendant in the wells located along the Barrier tract, and if the defendant had made an effort to adjust its water injection rates in the various wells so as to minimize the effect on the plaintiffs' property and avoid flooding out the plaintiffs' wells and causing the Barrier lease to produce excessive quantities of water, a very large portion of the injury and damage to the plaintiffs' lease and wells could have been avoided without additional expense or loss to the defendant.

XL.

The defendant located, drilled and completed the salt water injection wells along the plaintiffs' boundary and injected water in them at excessive and unreasonable rates deliberately and intentionally, at least to the extent that its agents and employees in charge of the operation, including qualified and experienced engineers, knew and assumed that the plaintiffs' wells and property would be damaged and knew that the rates of water injection were excessive, unreasonable and improper from the standpoint of the effect on the Barrier lease. In general, the defendant and its agents and employees in charge of the operation acted without justifiable excuse and with a reckless and wanton disregard of the rights and property of the plaintiffs; and the injury to the plaintiffs' property could have been, and was in fact, foreseen and anticipated.

XLI.

In locating and drilling the salt water injection wells along the boundary of the Barrier lease, particularly wells W-16, W-17 and W-18, and by injecting salt water

in unreasonable and excessive rates and quantities in the six wells maintained and operated along the property line, the defendant has been negligent in failing to observe the ordinary and reasonable standards of care to prevent injury to adjoining property. This is particularly true where, as in this case, the injury could have been and was foreseen and defendant made no effort whatsoever to avoid it; and in view of the fact that there is no custom or practice in the industry of injecting salt water against the property line of an oil and gas lease being produced by primary recovery methods.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of this action and the parties.

II.

The defendant has made an unreasonable use of its property and has been negligent in failing to prevent or at least minimize injury to the plaintiffs' oil and gas leasehold estate and the producing wells thereon when the injury was actually foreseen and was avoidable.

III.

By the injection of salt water in wells around the perimeter of the plaintiffs' lease, which was expected to and did, in fact, invade the Bartlesville formation under the plaintiffs' lease, the defendant has committed a trespass upon the property of the plaintiffs and that trespass was the direct and proximate cause of the damage shown by the evidence.

IV.

The conduct of the defendant in locating several of its water injection wells so close to the plaintiffs' lease bound-

ary and in some cases, directly opposite commercial wells producing on primary recovery and injecting excessive quantities of salt water in the wells on the boundary, all with the knowledge and expectation that the water would move upon the plaintiffs' property and damage it and destroy some of the producing wells, amounts to a deliberate injury and a wanton, reckless disregard of the plaintiffs' rights and property for which plaintiffs are entitled to recover both actual damages and punitive damages.

V.

The original order of the Kansas Corporation Commission granting the defendant authority to conduct secondary recovery operations by the injection of salt water in the Bartlesville formation on the oil and gas lease adjoining the plaintiffs' property and other leases, did not expressly or by implication, authorize the defendant to conduct operations which would damage or would be expected to damage the plaintiffs' lease or any of the wells located thereon or to otherwise unreasonably interfere with their right to develop, operate and produce their lease or wells for oil and gas.

VI.

The order of the Kansas Corporation Commission dated March 7, 1957, entered on the complaint of the plaintiffs, after hearing, and the orders and judgment made and entered on appeal of that proceeding, did not present or determine the issues involved in this case and the Commission lacked jurisdiction to consider or determine these issues. Therefore, the proceeding does not constitute an estoppel by judgment against the plaintiffs in this action.

VII.

A judgment should be entered in favor of the plaintiffs and against the defendant for compensatory or actual damages in the amount of $620,700.00 and, in addition, for punitive or exemplary damages in favor of the plaintiffs and against the defendant in the amount of $25,000.00. The judgment shall bear interest at the rate of 6% per annum from the date of judgment until paid. The costs of this action (including the cost of the reporter's appearance and the original copy of the depositions taken by both parties) are taxed to the defendant.

JOURNAL ENTRY OF JUDGMENT

IT IS, THEREFORE, BY THE COURT, ORDERED AND ADJUDGED that plaintiffs have and recover a judgment against the defendant in the amount of $620,700.00 for actual damages and the further sum of $25,000.00, as punitive damages, and further, that defendant pay the costs.

(Signed) Delmas C. Hill
Chief Judge.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM—1963

TIDEWATER OIL COMPANY,
Appellant,
vs.
GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As JACKSON BROTHERS,
Appellees.
No. 6944

Appeal from the United States District Court for the District of Kansas

James P. Hart and Richard Jones for appellant.

Robert Martin for appellees.

Before MURRAH, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

MURRAH, Chief Judge.

This is an appeal from a judgment for the plaintiff in a diversity suit for damages, brought by a Kansas oil and gas leaseholder against an adjoining leaseholder, for the wrongful water flooding of his lease. Water flooding is a legally and scientifically accepted method of producing oil and gas by the introduction of foreign water into an oil bearing formation, usually after primary production methods are no longer profitable. Generally, the method

involves the interjection of water, under pressure, into strategically located input wells for the purpose of generating a water drive, which pushes residual oil forward for recovery through output wells.[1]

Applicable Kansas law provides that the owner or operator of any producing oil or gas well, from any sand or producing formation, "shall be permitted in the interest of oil and gas conservation, to introduce and inject * * * water * * * under pressure upon such sand * * * or formation, for the purpose of recovering the oil and gas contained therein," provided that such owner "shall make a written application to the state corporation commission for authority so to do, and written approval has been granted * * *." And provided further "that the operation shall be done under the rules and regulations of the commission." Kansas General Statutes, 1949, 55-133 and 55-134.

The Blankenship-Sallyard oil field in Butler and Greenwood Counties, Kansas, was discovered in 1917; was fully developed in the 1920's and early 1930's; and most, if not all, of the producing wells were fully depleted for primary recovery in 1948. The appellant, Tidewater, is the owner of a number of leases in the field, on which it drilled about 90 producing wells. Some of these leases

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1. See: General Counsel Report to the Interstate Oil Compact Commission, Sept. 29, 1961, and amended Oct. 13, 1961; Secondary Recovery Operations—Their Values And Their Legal Problems, by George H. Bowen, Thirteenth Annual Institute On Oil And Gas Law And Taxation, Southwestern Legal Foundation; Some Legal Aspects Of Water Flooding, by Brown and Myers, 24 Tex. Law Rev. 456; Hughes, Legal Problems Of Water Flooding, Recycling And Other Secondary Operations, Southwestern Legal Foundation, Ninth Annual Institute On Oil And Gas Law And Taxation 105 (1958); and Arkansas General Statutes, 1947, Title 53, Sec. 127.

adjoined on the south and east, the non-productive and undeveloped Barrier tract, on which appellee, Jackson Brothers, later acquired the lease in suit. Secondary recovery operations in the northeast part of the pool were first started in 1946. Tidewater's water flood operations were commenced on its leases on the southwest edge of the pool (about two and one-half miles from the Barrier tract) in 1949. The "five spot pattern"[2] operation apparently contemplated a general plan of developing about 100 acres per year, as the flood front progressed, i.e., the water drive would proceed in stages of about 100 acres per year, northeasterly along the trend of the pool, and toward what is now the Jackson-Barrier lease. Tidewater apparently first made application to the Kansas Corporation Commission in 1953, for authority to repressure and water flood the producing sand formation under its leases in eleven sections (about 2,000 acres of leases) in Greenwood and Butler Counties, including leases immediately adjoining the then non-productive Jackson-Barrier lease.

The Jacksons had obtained a lease on the Barrier land about a year previously, and had commenced the drilling of a well (the Barrier No. 1), 48 feet from the east boundary and 61 feet from the south boundary of its lease, adjoining Tidewater's leases. The well was abandoned without production, and the lease was terminated. In 1954, however, the Jacksons obtained another lease on the same land and completed the first producing well on the original location during that year. During the period 1954 through 1956, the Jacksons drilled nine producing wells along the south and east boundaries of the Barrier lease. The wells were located on a three acre spacing pattern; they were heavily fractured; and, each of them pro-

2. Under this plan, each producing well is surrounded by four water injection wells. (R. 15)

duced oil in paying quantities by primary recovery methods. By mid-1956, the wells had produced approximately 100,000 barrels of oil. About this time, Tidewater notified Jackson Brothers of their intention to water flood their properties adjacent to the Barrier lease, and proposed a co-operative water flood project, the cost to be shared proportionately, according to acreage ownership in the project. The Jacksons declined to join the venture, for the expressed reason that their wells were then producing in paying quantities. Tidewater thereupon drilled three input wells, about 12 feet east of their western boundary, and converted three other wells for water injection, on Tidewater's northern lease boundary, offsetting and very close to six of the Jacksons' producing wells.

The water injected into the Tidewater input wells soon flooded eight of the Jacksons' wells, and they complained to the Kansas Corporation Commission, alleging that Tidewater had unlawfully flooded their wells, causing irreparable harm. The Commission was asked to enter a cease and desist order, and to permanently prevent the escape of salt water into the oil bearing formation underlying the complainant's lease. The Commission entered its cease and desist order and the water flooding was abated, pending a hearing before the Commission on the merits. After a full hearing, the Commission promulgated its memorandum opinion, in which it defined the issues within its province as being statutorily limited to (1) matters involving the prevention of waste; and (2) the protection of correlative rights of interested parties in a common source of supply. It then proceeded to consider whether the water flood project was within the permissive order of the Commission, and noting the absence of any claim that Tidewater's operations exceeded the authority

granted, and the absence of any evidence of unlawful operation, the Commission concluded that no waste was being committed within the meaning of the conservation laws of the State of Kansas. In that respect, the Commission observed that, by its very nature, the water flood project contemplated the eventual flooding of every producing well in the reservoir, "but the oil is not lost; it is pushed forward by the injected water, which displaces the oil in the reservoir." And, that the placing of line injection wells along the lease boundary is the accepted method of preventing the movement of the oil from lease to lease. On the question of the correlative rights of the parties, as defined by its Rule 82-2-101,[3] the Commission stated that correlative rights related only to the ratable withdrawal of oil and gas from a common reservoir, and since no question of ratable taking was presented, there was nothing for the Commission to decide. See also: Correlative Rights In Oil And Gas, by Eugene Kuntz, 30 Miss. Law Journal, Dec., 1958, pp. 1-9. It thus concluded that "no waste of natural resources nor injury to correlative rights having been shown, it appears that the instant proceedings presents no justiciable matter for action by the Commission." It was furthermore careful to point out that "an action for damages for the flooding of producing wells may be available to the owners of such wells, but the forum for such a damage action is in the courts, not this Commission."

On judicial review to the appropriate state district court and the Supreme Court of Kansas, the Commission's

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3. The Commission, in its Rule 82-2-101, has defined correlative rights as follows: "Correlative Rights shall mean that each owner or producer in a common source of supply is privileged to produce therefrom only in such manner or amount as not to injure the reservoir to the detriment of others or to take an undue proportion of the oil or gas obtainable therefrom, or to cause undue damage between developed leases."

memorandum and order was affirmed, as in accordance with applicable law and based upon substantial and competent evidence. See: *Jackson* v. *State Corporation Commission*, 326 P.2d 280; 348 P.2d 613. This suit was commenced and came to issue in the federal court, during the state court litigation, and came on for trial a few days after the order of the Commission was affirmed by the Kansas Supreme Court.

In this federal court action, the Jacksons alleged the ownership and location of the leases, and the complete flooding of their producing wells, as a direct result of Tidewater's water flood project. They alleged that Tidewater's acts were deliberately done, with full knowledge of the consequences of such acts, and with wanton disregard of the plaintiffs property rights. They alleged the permanent loss of oil and the necessity of drilling additional wells in an effort to capture and produce oil, which could have otherwise been produced through the existing wells, to their detriment in the amount of $800,000.00 and asked for exemplary damages in the sum of $250,000.00.

Tidewater affirmatively pleaded estoppel to litigate the issues raised in the complaint on the grounds that all such issues had been previously litigated between the parties before the Kansas Corporation Commission, and finally affirmed in the Supreme Court of the State of Kansas. It moved for summary judgment, apparently on the ground that no triable issue survived the state court litigation and it was, therefore, entitled to a judgment as a matter of law. Throughout the trial and until final disposition, estoppel was one of the paramount issues in the case. The point is urged on appeal, and if valid, is dispositive of the lawsuit.

Kansas adheres to the salutary rule which plainly forbids a suitor to twice litigate matters against the same

party, even on a different cause of action. See: Freeman On Judgments, 5th Ed., Vol. II, §§ 624, 625 and 670. An early Kansas case stated the "true" rule to be that "where a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding was made or the judgment rendered * * *." *Stroup* v. *Pepper*, 76 P. 825; and see: *Smith* v. *Russ*, 339 P.2d 286; *Security Insurance Co. of New Haven* v. *Johnson*, 276 F.2d 182.

The Jacksons first take the position that the doctrine is wholly inapplicable to determinations of an administrative tribunal, such as the Kansas Corporation Commission, and that judicial review, on the record made before the tribunal, adds nothing to the stature or dignity of the determinations of the tribunal. We think, however, that a suitor may have a full day in court in an administrative tribunal, on matters within its competence, quite as effectively and conclusively as any other adjudicatory tribunal. "Whenever any board, tribunal or person is by law vested with authority to judicially determine a question, such a determination, when it has become final, is as conclusive as though the adjudication had been made by a court of general jurisdiction." Freeman On Judgments, 5th Ed., Vol. II, §633, p. 1335. "It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred." 31 U.S. 691, 729; quoted in Freeman On Judgments, 5th Ed., Vol. II, §670, p. 1413. The essential inquiry, in any case where the con-

clusive effect of an order or judgment is pleaded, is this whether the critical issue was within the power and authority conferred upon the first tribunal to which the issue was tendered, and whether the matter pleaded as collateral estoppel was actually adjudicated. See: Restatement On Judgments, §68 (1) and (2). Estoppel cannot "extend beyond the point actually litigated and determined." *Cromwell v. County of Sac*, 94 U.S. 351, 354. And, it operates on ultimate, as distinguished from evidentiary, facts. See: *Paulos v. Janetakos*, 129 P.2d 636, 142 A.L.R. 1237, and see Annot., p. 1243.

The determinations of the Kansas Corporation Commission, of matters within its competence, is undoubtedly binding here, insofar as applicable to this asserted claim. Cf. *City of Hastings, Nebraska v. Kansas-Nebraska Nat. Gas Co.*, 226 F.2d 419. Tidewater takes the firm position that the Commission's original order gave it a legal right to water flood its properties, and incidentally to inject water in line wells adjoining the Jacksons' lease; that the lawfulness of its operations in the exercise of that right have been questioned in the Kansas courts of competent jurisdiction, and determined to be lawful and free from wrong; and, that these determinations serve to exonerate it from any tort liability to the Jacksons. Specifically, Tidewater says that if the legislative policy of the State of Kansas, with respect to oil and gas conservation, is to be effective, the determinations of the Commission must be construed to mean, "that the producer can conduct the water flooding program without legal liability for the effects which the program may have upon other owners in the same reservoir." The trial court took the view, however, that the order of the Commission did not purport to determine the issues involved in this case; and did not, therefore, work an estoppel to assert this tortious claim.

We agree with the trial court, and we think the reasons are plain and irrefutable.

In this suit, no one can deny the validity of the order permitting Tidewater to water flood its properties, or that the water flood operations were being conducted in accordance with a valid order. That issue has been conclusively adjudicated in the Kansas courts, and, contrary to the trial court's findings, it must be conceded that the Commission's order, "contemplated the eventual flooding of every producing well in the reservoir," even to the point of destroying the productivity of the wells on an adjoining lease. But, the fact that an act is lawfully undertaken and lawfully done does not, ipso facto, relieve the actor of liability for the harmful consequences of his act. See: *Helm* v. *Eastern Kansas Oil Co.*, 169 P. 208; and *Gulf Oil Corporation* v. *Hughes*, 371 P.2d 81. And, no one claims that the Commission is empowered to determine Tidewater's tort liability for such conduct. That matter was specifically left to a court of competent jurisdiction. And, "(w)here a court incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter directly." Restatement of the Law of Judgments, §71; and see: Harvard Law Rev., Vol. 56, p. 1, 18. It is wholly inadmissible and incompatible with fundamental principles of due process to hold that a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that issue, by conclusive adjudication of the operative facts upon which his claim must rest. We hold that the issue of tort liability for the acts done and performed by Tidewater, in the exercise of its right granted by the Commission to water flood its properties, survives the determinations of

the Commission; and, that they are cognizable in this proceedings.

The question then is by what standards of tort liability shall Tidewater's conduct be judged, i. e., trespass, nuisance, negligence, strict liability, or unreasonable use or disregard of another's property. The question is, of course, governed by Kansas law, and the parties concede that the Kansas courts have not considered tort liability for secondary recovery by water flood operations. We must lay aside any question of liability growing out of a compulsory unitization project, where the common source of supply is subjected to a legalized regulation, and wherein the relative rights of interested parties are determined and constitutionally protected. We are concerned with a unilateral operation, under a permissive order of the Commission, which authorizes the leaseholder to conduct water flood operations on his own lease, in a common source of supply, subject to the duties, obligations and consequent liabilities imposed by law. See: Compulsory Unitization And Individual Interests: Judicial Or Administrative?, by Maurice H. Merrill, Okla. Law Rev., Vol. 8, p. 389; Implied Covenants And Secondary Recovery, by Maurice H. Merrill, Okla Law Rev., Vol. 4, p. 177.

In the absence of a Kansas statute governing the rights of parties, arising from the underground movement of injected and pressurized fluids, the Kansas court has applied its statute, making it "unlawful" to permit salt water, oil or refuse to escape "by overflow, seepage or otherwise" without proof that the escape was beyond control, or that it could not have been reasonably anticipated and guarded against. Kansas General Statutes, 1949, 55-121. Thus, in an action for damages for the pollution of a water supply, due to the negligent operation of a salt water disposal well, into which salt water was injected

under pressure, the court absolved the claimant of the burden of proving negligence, on the theory that the statute imposed liability for the underground invasion, in the absence of proof that the acts committed were beyond the control of the operators, or could not have been reasonably anticipated and guarded against. See: *Polzin* v. *National Co-Op. Refinery Ass'n.*, 266 P.2d 293. The Oklahoma court has held a somewhat similar Oklahoma statute (Title 52, O.S., §296) inapplicable to underground flooding, but has readily recognized common law tort liability for intentional harm or damage to an adjoining land owner, due to underground water flooding operations. *Larkins-Warr Trust* v. *Watchorn Petroleum Co.*, 174 P.2d 589; *West Edmond Salt Water Disposal Assn.* v. *Rosecrans*, 226 P.2d 965; and *West Edmond Hunton Lime Unit* v. *Lillard*, 265 P.2d 730. Cf. *Ohio Oil Company* v. *Elliott*, 254 F.2d 832. The Texas court rejects the theory of absolute liability for the conventional rule of negligence. See: *Turner* v. *Big Lake Oil*, 96 S.W.2d 221; and *Gregg* v. *Delhi-Taylor Oil Corp.*, 344 S.W.2d 419. They hold the orthodox rules and principles applicable to surface invasions of land inapplicable to subsurface invasion arising out of secondary recovery of natural resources, and specifically say that the technical rules of trespass have no place in the consideration of the validity of the orders of a regulatory commission. See: *Railroad Commission of Texas* v. *Manziel*, 361 S.W.2d 560.

The adjudicated cases are extensively treated under assumed facts, much like ours, by Mr. Bowen in his treatise on secondary recovery operations. (See Footnote 1) He thinks it "logical to conclude that secondary recovery operations should be governed by the negligence rule and that operators should only be liable for damage resulting from negligence or from intentional or reckless trespass, unless by specific statutory provision a more stringent de-

gree of liability is fixed." (See: Bowen, ibid, p. 359.) Keeton and Jones in their recent article, Tort Liability And The Oil And Gas Industry, 39 Tex. Law Rev. 253, also treat all of the adjudicated cases from Kansas, Oklahoma and Texas, including the instant case in the District Court. They suggest that orthodox rules and principles applicable to surface invasions should not be appropriately applied to subsurface invasions, arising out of operations affected with a public interest and involving a weighing of the individual interest of the damaged lessee against the social interest involved in the production and conservation of crude oil. And see: Restatement of Torts, §§ 826-831 and 832.

Whatever rule Kansas may ultimately fashion to govern the rights and liabilities of parties affected by underground water flood operations in the interest of conservation, it seems fair to assume that it will proceed upon the basic and inescapable proposition that, "no man's property can be taken directly or indirectly without compensation * * *." *Heim* v. *Eastern Kansas Oil Company*, *supra*, citing *Hauck* v. *Pipe Line Company, Ltd.*, 26 A. 644. Even the sovereign must pay for what it takes or damages for the public good, and it cannot absolve a private party from the same duty.

Proceeding on this fundamental premise and under the rule of *Polzin* v. *National Co-Op. Refinery Ass'n.*, *supra*, it is safe to assume that, though a water flood project in Kansas be carried on under color of public law, as a legalized nuisance or trespass, the water flooder may not conduct operations in a manner to cause substantial injury to the property of a non-assenting lessee-producer in the common reservoir, without incurring the risk of liability

therefor. And see also: *Gulf Oil Corporation* v. *Hughes*, *supra*; and Restatement of Torts, §822.[4]

The claim here is based upon intentional and unreasonable interference with the claimants' property rights, resulting in actual and substantial damages. The trial Court found that Tidewater had injected water at unreasonable and excessive rates in the wells located along the boundaries of the Barrier lease, "and that such injections at such high rates were especially unreasonable, since the injection wells were deliberately located as close as possible to the property line and immediately opposite and within less than 100 feet of two of the plaintiffs' wells."

These findings are, to be sure, irreconcilably inconsistent with the conclusive administrative findings to the effect that the water flooding operations were carried on in a lawful manner. In the view we take of the case, however, it is unnecessary to reconcile the findings. It is sufficient that the water flooding activities were intentional and the consequences foreseeable. They were actionable, even though lawfully carried on, if they caused substantial injury to the claimants.

The factum of harm, with resultant daamges to the claimants' property, may be said to have been established with reasonable certainty, and having thus established the right to recover damages, we may, under well recognized rules of law, approximate the amount thereof. See: *Garcia* v. *The Mountain States Telephone and Telegraph Company*, (10 C.A.) F.2d

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4. Judicial Regulation of Discordant Land Use Interest, by Edgar R. Casper, 61 Dickinson Law Rev., January, 1957, pp. 163-187; Nuisance, Ultrahazardous Activities, and the Atomic Reactor, 30 Temple Law Quarterly, Winter, 1957, pp. 77-125.

The trial Court's judgment for compensatory damages is based upon estimated loss of profits. From competent expert testimony, the Court specifically found that when the Jacksons drilled their first well, there was approximately 677,800 barrels of gross stock tank oil in place under the lease, and recoverable through the wells ultimately drilled on the lease; that this amount of oil would have been recovered by the Jacksons, by primary and secondary recovery methods, but for the interference of the water injected by Tidewater along the boundaries of the property. The Court further found that the production of this amount of oil would have resulted in an operating profit of $1,549,400. The Court then found that, as a direct result of the injection by Tidewater, of salt water in the line wells along the boundaries of the tract, the Barrier lease will, in fact, produce only 477,000 barrels of oil, or a net loss of approximately 192,000 barrels attributable to the working interest in the lease. Relating this net loss of recoverable oil, in terms of operating profit, the Court specifically found the loss of realizable net profit to be $620,700. The Court explained that this loss was the result of increased lifting costs, due to the necessity of disposing of excessive quantities of water injected by Tidewater; the loss of fuel for the pumping wells, due to the loss of natural gas as a result of the flooding operations; the acceleration of the time when the economic limit of production from the wells on the Barrier tract would be lost; the destruction and loss of producing wells on the Barrier property; and, the loss of substantial quantities of recoverable oil under the Barrier lease, as a result of being by-passed or "watered off" by the excessive injection of salt water by Tidewater. The findings follow closely the creditable testimony of an expert witness for the Jacksons, which the trial Court credited as against the contravailing and equally competent testimony of Tidewater.

Tidewater does not directly attack the formula employed by the credited witness in estimating the amount of recoverable oil and the cost of production, before and after the flooding. It does, however, strenuously insist that the calculations and computations were necessarily based upon the assumption that the Barrier lease was a virgin, undepleted, producing formation, at the time the wells were drilled They insist that the Barrier lease was geologically a part of the same common source of supply, which was first tapped in 1917, and which had been fully depleted for primary recovery when the Jacksons' wells were drilled; that the production from the wells was, in fact, the result of the water flooding operation, which pushed Tidewater's oil across its lease boundary, under the Barrier lease; and, this being so, the estimated recoverable reserve, based on a virgin reservoir, is wholly erroneous and a judgment thereon cannot be sustained.

It seems to be conceded that the Barrier lease and Tidewater's depleted wells are within the same common source of supply, and that there was direct subsurface communication between the old wells and the newly drilled wells on the Jacksons' lease. But, even so, there was positive testimony to the effect that the Jacksons' wells were drilled into an "essentially virgin reservoir," due to a thinning of the producing formation on the western edge of the Tidewater lease, thereby forming a "bar" to prevent drainage from the Barrier lease toward the old wells. In any event, the virgin reservoir premise, upon which the Jacksons' engineers based their estimated recoverable reserve, is supported by geological theories, which the trial Court apparently credited, and which we certainly cannot say are without foundation. The trial Court recognized and found that the reservoir pressure under the Barrier lease may have declined, as a result of the production on the adjacent properties, but not sufficient

to seriously interfere with the ability of the wells to profitably produce, by primary recovery methods. From the whole record we are convinced that the trial Court's judgment is based upon applicable rules for ascertaining compensatory damages for loss of profits, and is supported by competent proof, and it is affirmed.

The judgment in the amount of $25,000, for exemplary damages, is based upon the finding that Tidewater "acted without justifiable excuse and with a reckless and wanton disregard of the rights and property of the plaintiffs." Kansas follows the general rule, which permits an award of damages in addition to compensatory or nominal damages, by way of punishing the wrongdoer for "willful and wanton invasion of the injured party's rights," and the burden is sustained by a showing of "such gross neglect of duty * * * as to evince a reckless indifference of the rights of others." *Watkins* v. *Layton*, 324 P.2d 130; and see also: *Corwine* v. *Maracaibo Oil Exploration Corporation*, 334 P.2d 419; and Restatement of Torts, §908.

The judgment for punitive damages in *Corwine* v. *Maracaibo Oil Exploration Corporation*, *supra*, was based upon a violation of the same statute which formed the legal basis for the compensatory judgment in *Polzin* v. *National Co-Op. Refinery Ass'n*, *supra*, but unlike either Corwine or Polzin, the acts complained of here, and which form the basis for both compensatory and punitive judgments, were committed under color, and in accordance with, Kansas law and, while they were wrongful and actionable in the common law sense, they were, as we have seen, lawfully undertaken and lawfully done, in the interest of conservation. While we cannot know the attitude of the Kansas court in circumstances like this, we venture to forecast that, when it does speak, it will not punish a common law wrongdoer for a legalized trespass or nuisance.

The judgment for punitive damages is, therefore, reversed.

LEWIS, Circuit Judge, concurring in part and dissenting in part.

I would affirm the judgment of the trial court in its entirety. While the acts of Tidewater which resulted in damage to respondents were undertaken pursuant to a valid order of the Kansas Corporation Commission and were committed in a manner not violative of a principle of conservation (and, hence, in this limited concept, "in accordance" with the order and lawfully carried out or done within the narrow authority of the Corporation Commission's jurisdiction), still I do not consider this to be dispositive of the question of punitive damage. The administrative order is not an impenetrable shield against actionable wrong in tort, much less, as here, a bar or deterrent to the application of legal principles penalizing wanton and reckless conduct. The trial court found, and I do not understand the majority to dispute the sufficiency of the evidence to support the finding, that Tidewater so located its water injection sites and needlessly and deliberately injected excessive quantities of water for the purpose of destroying the productivity of respondents' wells. This conduct upon the part of Tidewater did not adversely affect conservation (and the Corporation Commission so found) but it did evince a reckless disregard of the rights of respondents (and the trial court so found). I am of the opinion that the trial court committed no error in assessing punitive damages.

APPENDIX "C"

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

GEORGE E. JACKSON and KARL B. JACKSON, dba Jackson Bros., Complainants. vs. TIDEWATER OIL COMPANY, a corporation, Defendant.	Docket No. 53,645-C (C-5342) Conservation Division

Memorandum Opinion

BY THE COMMISSION:

This proceeding was initiated by a complaint filed with the Commission by George E. Jackson and Karl B. Jackson, doing business as Jackson Brothers, against the defendant, Tidewater Oil Company, a corporation, in which complaint was made of defendant's acts, alleged to be unlawful, in operation of its water flood project on its Blankenship-Sallyards Unit adjoining complainants' land in Greenwood County, Kansas. It was further alleged that said unlawful acts of the defendant cause waste of natural resources in violation of statutory provisions (G.S. 1949, 55-601, and G.S. 1955 Supplement, 55-121) and in violation of Commission Rules 82-2-102 and 82-2-121; and that said acts are causing and will continue to cause damage to complainants; wherefore, complainants asked the Commission to issue an immediate order directing defendant to cease and desist its water flood operations in the described area and to issue a permanent order modifying defendant's repressuring authority after a public hearing on the complaint.

Pursuant to said complaint, the Commission suspended defendant's repressuring authority insofar as it pertained to input wells bordering complainants' lease pending public hearing on the complaint. Thereafter a public hearing was duly held at the Commission's Hearing Room in Topeka, Kansas, on December 18, 1956, and continued on December 27, 1956, at the same place. At said public hearings complainants were represented by Harold G. Forbes and George Forbes, both of Eureka, Kansas, and by Arthur L. Claussen, of Topeka, Kansas. Defendants were represented by Jack D. Jones and Harry D. Page, both of Tulsa, Oklahoma, and Carl, C. Chase, of Eureka, Kansas; Bill G. Honeyman and Richard G. Rossman, Assistant General Counsels, appeared for the Commission and the public generally.

At the outset, in order to understand the situation and questions involved, it is necessary to review briefly the factual situation from which the present controversy arose.

The first primary development in the Blankenship-Sallyards field was in 1917, by which time the average oil lasted from 1917 to 1942, by which time the average oil production rate for Tide Water's 89 wells in the field was 1.7 barrels per day per well. The initial water flood project in the Sallyards Shoestring was the Ladd Unit, started in 1946. Tide Water commenced its secondary recovery operations in 1948 and early 1949 with development of the Dickinson "B" Lease in the SW 4 of Section 16, Township 26 South, Range 8 East, Butler County, Kansas. Water flooding operations have been continued since that time by Tide Water Oil Company as well as by a number of other operators in this field, among which are Great Southern Oil Company, Pearing and Marshall, Williams Brothers, Franco-Central, Lillystrand, and Sohio Petroleum Company.

On April 3, 1952, Jackson Brothers, Complainants, obtained its Barrier lease covering all the SE 4 north of U. S. Highway 54 in Section 3, Township 26 South, Range 8 East, Greenwood County, Kansas. The lease was for three years but provided for termination if no well were commenced on the described land on or before June 1, 1952. On May 31, 1952, complainants commenced the drilling of a well by setting 83 feet of surface pipe in a hundred foot hole at a point 48 feet from the east boundary and 61 feet from the south boundary of the above-described lease, then removed the derrick and took no further action toward completing the well until April, 1954, after they had released of record the lease above referred to, and obtained another lease covering said SE 4 of Section 3 and additional land.

As the water flood project in this reservoir progressed toward the properties involved in this case, Tidewater filed an application with this Commission, under the provisions of G.S. 1949, 55-133 and Commission Rules and Regulations 82-2-500 to 82-2-505 issued pursuant thereto, requesting authority to repressure and water flood the Bartlesville Sand Formation into wells on its Blankenship-Sallyards Unit covering its leases in eleven sections in Greenwood and Butler Counties, Kansas. The application was, on July 14, 1953, assigned Docket No. 45,706-C (C-3565) and in due time, having been approved by the Commission staff and the Oil Field Section of the State Board of Health and no objections having been filed thereto, the Commission on July 27, 1953, issued an order in said docket granting the authority applied for. Applicant in preparation and completion of its verified application furnished a plat of the area showing wells and leases within 1 2 mile radius of the described lease boundaries and stated that copies of the application had been mailed to all operators of producing or drilling wells within 1 2 mile radius of

said boundaries. Complainants' names did not appear on the plat nor were they listed as offset operators.

Pursuant to its authority, Tidewater has proceeded to develop its repressuring project in the Sallyards Shoestring area at the rate of approximately 100 acres per year, utilizing the five-spot development pattern established for the field. It had advanced to the Hull and Stevenson leases (south and east of complainants' Barrier lease) early in 1956.

In April, 1954, complainants started development of their leased property in the Southeast Quarter (SE 4) of Section 3, adjoining Tidewater's repressuring project. In the interim from April 13, 1954, to October, 1956, they had located nine producing wells along the south and east boundaries of said Barrier lease, No. 1 being the well for which surface pipe was set in May, 1952. Wells 1 to 6 were located along the south boundary approximately 50 feet distant therefrom, and were 330 feet apart; wells 7, 8 and 9 were located on a line north from Well No. 1, following the same three-acre spacing pattern. All nine wells were heavily fractured and had produced a total of some 100,000 barrels of oil up to commencement of this action.

On May 15, 1956, Tidewater notified complainants of the proposed water flood on properties adjacent to their Barrier lease and proposed a cooperative water flood project, the cost to be shared proportionately according to the amount of acreage of each lease owner benefiting from the flood. Complainants did not approve nor join in the proposed cooperative agreement for a secondary recovery project.

In July, 1956, Tidewater drilled its input Well W-16, and later completed Wells W-17 and W-18 about 12 feet east of the western boundary of its Stevenson lease in Section

2, W-16 being south and east of complanant's Barrier No. 1 Well, and W-17 and W-18 located on a line north of W-16 at intervals of 660 feet and 1,320 feet thereform.

Water injected into Tidewater's input wells had flooded complainant's Wells Nos. 1 and 3 at the time this action was commenced. Pursuant to Commission order dated December 4, 1956, Tidewater's input wells W-16, W-17 and W-18 and other input wells along the south and east boundaries of complainant's lease have been shut down.

The questions for consideration and determination in this proceeding before the Commission are necessarily determined by the jurisdiction of the Commission in the premises. This Commission has broad powers in conservation matters in the prevention of waste and protection of correlative rights. But its jurisdiction is created and limited by statute to that phase of regulation of oil and gas matters.

Pursuant to its statutory authority in these matters and to facilitate administration of the powers given, the Commission has adopted general rules and regulations in conservation matters. One section of these rules and regulations, 82-2-500 et seq., deals with repressuring operations, adopted pursuant to G.S. 1949, 55-133, 134.

Complainants alleged that defendant's acts in operation of its water flood were unlawful. They also raised a question in regard to the sufficiency of defendant's compliance with the notice requirement of the Commission's Rules in connection with its application for repressuring authority in the area involved. The pertinent Commission Rule is 82-2-502, sub-section E of which requires that notice of the application shall be given to each operator of drilling or producing wells within one-half mile radius of the boundaries of the lease involved in the repressuring project. The rule continues:

"F. Objections or complaints, stating the reasons why the proposed plan as contained in the application may cause damage to oil, gas, or fresh water resources, must be filed within ten days after the application is filed.

"G. In the event any such objection or complaint is filed or the Commission on its own motion deems that there should be a hearing on the application, a hearing shall be had after reasonable notice of the time, place and subject matter of such hearing has been given to the parties in interest."

There is in the Commission Rules no requirement for notice to adjoining leesees or landowners; the notice requirement provides for notice to operators of drilling or producing wells within one-half mile of the boundaries of the lease under water flood. At the time here in question there was no drilling or producing well within the purview of said Commission Rule on the complainants' land. To hold otherwise—that is, to require that notice be given to the operator of a lease where a well had been spudded-in and then abandoned, would require an applicant to make a physical inspection of all adjoining leases to locate possible well locations, which would obviously be an untenable requirement.

It should further be pointed out that the purpose of the Commission's notice requirement is to permit the filing of objections to the application which will be heard thereafter in a public hearing thereon before the Commission. The Commission will then decide whether, as a conservation measure, the application should be granted. An objection so filed does not defeat the application nor insure its denial by the Commission; it merely provides that the objector and the applicant may present their cases before the Commission in a public hearing held for that purpose, at the termination of which the Commission in

performance of its statutory duty grants or denies the authority applied for.

Complainants made the following allegations of specific unlawful acts of defendant:

(1) That Tidewater allowed salt water injected into the Bartlesville formation of input wells on its leases to escape into the Bartlesville formation of complainant's adjoining Barrier lease resulting in the unlawful flooding of complainants' wells.

(2) That said unlawful acts of defendant have caused and will cause irreparable harm to complainants by displacing with salt water the oil in the Bartlesville formation underlying their lease; by loss of production from wells on the lease; and by rendering valueless complainants' producing wells.

Defendant's acts were not unlawful when they were operating pursuant to state statutes (G.S. 1949, 55-133, 4) and Commission Rules and Regulations (82-2-500 et seq.).

No claim is made that defendant's operations exceeded the authority granted them nor was evidence of such unlawful operation presented. Line injection wells are the normal pattern for water flood projects which seek to confine oil within the lease for production from a central well. In a water flood project, one water injection well will eventually flood every producing well in the reservoir. It must be assumed that the legislature was aware of the behavior of reservoir fluids in a repressuring project when the statute authorizing repressuring was enacted. Confining reservoir fluids to the boundaries of a lease would be impossible under natural physical laws.

A hearing before this Commission is not the proper forum for allegations of compensatory damage, inasmuch

as Commission jurisdiction is by statute limited to the prohibition of waste in production of crude oil and natural gas and the protection of correlative rights.

(3) Complainants alleged further that defendant's operations violated G.S., 1955 Supp., 55-121, G.S. 1949, 55-601, and Commission Rules 82-2-102 and 82-2-121 adopted pursuant thereto; and

(4) That continuation of said unlawful acts will cause irreparable damage to complainants and waste to natural resources.

G.S., 1955 Supp., 55-121 and Commission Rule 82-2-121 relate to confinement in tanks, pipe lines or ponds of salt water encountered during the drilling of an oil or gas well; they are not applicable to lawful repressuring operations under G.S. 1949, 55-133, and Commission Rules 82-2-500 et seq. where salt water is injected into producing formations under authority duly granted as there provided.

G.S. 1949, 55-601 provides:

"55-601: Waste prohibited. That the production of crude oil or petroleum in the state of Kansas in such manner and under such conditions as to constitute waste is hereby prohibited and shall be unlawful."

Commission Rules 82-2-102 and 82-2-103 are as follows:

"82-2-102: The production of crude oil in such manner and under such conditions as may cause waste is prohibited. That the term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, waste of reservoir energy, and the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands."

"82-2-103: Whenever the full production from any common source of supply, herein called 'pool,' of crude oil in this state can only be obtained under conditions (a) constituting waste, as defined in Section 55-602, General Statutes of 1949, or (b) independently of waste, under conditions injurious to the respective correlative rights of the producers therein, or causing undue drainage between developed leases therein, or (c) under conditions unreasonably discriminating against other pools in the state, then any person having the right to drill into and produce oil therefrom may take therefrom currently no more than that proportion of all crude oil which may be produced therefrom, currently without waste, or without such injury, or without such discrimination . . ."

Do defendant's acts complained of constitute waste as defined and prohibited by the above provisions?

In 1935, the Kansas Legislature enacted the following statute providing for repressuring and water flooding projects:

"The owner or operator of any well, or wells, which produces oil or gas from any sand strata, or formation, shall be permitted, in the interest of oil and gas conservation, to introduce and inject air, gas, water, or other fluid under pressure upon such sand, strata, or formation for the purpose of recovering the oil and gas contained therein:" (G.S. 1949, 55-133)

G.S. 1949, 55-134, further provides: "55-134: Rules and regulations authorized. The state corporation commission is hereby directed to prescribe such rules and regulations as are necessary to carry out the provisions of this act."

The above provisions and Commission Rules adopted pursuant thereto are still in full force and effect.

The legislature by enacting the provisions for repressuring and water flooding "in the interest of oil and gas

conservation" has negatived the suggestion that such operations are a waste of natural resources; on the contrary, they permit the recovery of oil and gas which would otherwise be lost. Testimony at the hearing herein established that Tidewater's cumulative production from its secondary recovery project in the Sallyards Shoestring from initiation of the project in 1949 to the year 1956, has some 2,327,785 barrels of oil from approximately 900 acres; that secondary recovery production in that area has amounted to approximately 4,500 barrels of oil per acre flooded; that proceeding with Tidewater's normal plan of development, it is anticipated the leases involved in this litigation will show comparable production figures. Producing wells may be flooded out in repressuring operations, but the oil is not lost; it is pushed forward by the injected water which displaces it in the reservoir. There is, therefore, no waste of the natural resource; it is still confined, waiting to be captured. An action for damages for the flooding of producing wells may be available to the owners of such wells but the forum for a damage action is the courts, not this Commission.

We come then to the final tenet of the Commission's jurisdiction: What are the correlative rights involved?

The question of protection of correlative rights cannot be considered in a unilateral aspect. The very nature of the consideration which must be accorded such question entails a weighing of all interests involved and rendering a decision which assures that no one producer is enriched to the detriment of other producers in the common source of supply.

The Commission, in its Rule 82-2-101, has defined correlative rights as follows:

"Correlative Rights shall mean that each owner or producer in a common source of supply is privileged

to produce therefrom only in such manner or amount as not to injure the *reservoir* to the detriment of others or to take an undue proportion of the oil or gas obtainable therefrom, or to cause undue drainage between developed leases." (Emphasis supplied)

There is no ambiguity in the language of this definition. The theory of collateral rights relates to the withdrawal of gas or oil from a common reservoir in amounts disproportionate to the interests of lessee owners.

The question of withdrawals from the common reservoir is not presented in this complaint involving the flooding of producing wells by water injected during a lawful water flood operation. In a water flood of this type the only way to prevent the movement of oil from leasee to lease and thus protect correlative rights is to place the injection wells on the lease boundary.

Commission jurisdiction in matters involving production of oil and gas is by statute limited to the prevention of waste and the protection of correlative rights. No waste of natural resources nor injury to correlative rights having been shown, it appears that the instant proceeding presents no justiciable matter for action by this Commission. The complaint should therefore be dismissed and the order temporarily suspending defendant's repressuring authority should be rescinded.

An appropriate order in conformance with the views heretofore expressed will be entered in this docket.

Raymond B. Harvey,
Secretary.

Topeka, Kansas
March 6, 1957
(Seal)

APPENDIX "D"

December 18, 1958
Clyde E. Milligan, General Counsel
State Corporation Commission
State Office Building
Topeka, Kansas

Carl C. Chase
Attorney at Law
Eureka, Kansas

Forbes & Forbes
Attorneys at Law
Eureka, Kansas

Re: Jackson vs. Sstate Corporation Commission

Gentlemen:

The above case was presented to the judges of both divisions sitting en banc on November 13, 1958. After considering the abstracts of the evidence, the exhibits and the arguments presented by counsel, we find that we are in substantial agreement with all of the findings of the commission, and that the decision of the State Corporation Commission should be affirmed in whole. The question was presented as to whether the order of the commission made on July 27, 1953, was valid in the absence of notice to the landowner and the appellants herein. As indicated above we have resolved this question against the appellants for a number of reasons, but we pause to comment that we are of the opinion that the rules of the commission should provide for more adequate notice to persons who might be affected as a result of its orders. It would not be asking too much of an applicant who intends to

water flood to require him to give notice to landowners in the vicinity and notice to any other person who might be affected by the order. The point is not really involved in this case for the reason that no constitutional right is herein involved, for the reason that the appellants are not the proper parties to raise the questions and for the reason that appellants have now had their day in court and had a determination of their correlative rights. We recognize that it is the prerogative of the State Corporation Commission to promulgate and interpret its own rules, but we make these comments to bring attention to the desirability of additional notice, in the hope that additional rules may be provided by the State Corporation Commission which, although not legally required, would provide for better opportunity to our citizens to appear and protect their rights.

Judgment in accordance with this opinion, affirming the findings and decision of the State Corporation Commission, will be entered at Eureka, Kansas, on December 23, 1958.

/s/ W. N. Calkins,
W. N. Calkins,
Judge 13th Judicial District,
Division II,

/s/ George S. Reynolds,
George S. Reynolds,
Judge 13th Judicial District,
Division I

APPENDIX "E"

No. 41,483

GEORGE E. JACKSON and KARL B. JACKSON,
Appellants,

vs.

STATE CORPORATION COMMISSION and TIDE-WATER OIL COMPANY,
Appellees.

SYLLABUS BY THE COURT

An oil producer filed application for and received authorization from the state corporation commission to repressure with salt water the Bartlesville sand formation on the producer's lease of approximately 900 acres. The repressuring operation approached nearer than one half mile to the leases of neighboring landowners, plaintiffs, who had not been listed on the application for the authorization, and by reason of such failure, had not received notice of the hearing had before the commission on the producer's application. Plaintiffs filed a complaint seeking a permanent cease and desist order and the commission issued a temporary cease and desist order. Plaintiffs were afforded a full and complete hearing by the comission on their complaint. As summarized in the opinion, a comprehensive memorandum opinion was filed by the commission followed by its decision dismissing the complaint and rescinding the temporary suspension order. The trial court affirmed the findings of fact and order in the commission's memorandum opinion. *Held*, (1) plaintiffs' complaint based on failure of notice is moot and (2) the trial court's affirmance of the commission's findings and

decision thereon, based on substantial competent evidence, although conflicting, is conclusive on appeal.

Appeal from Greenwood district court; W. N. CALKINS and GEORGE S. REYNOLDS, judges *en banc*. Opinion filed January 23, 1960. Affirmed.

Harold G. Forbes, of Eureka, argued the cause, and *Thomas C. Forbes* and *George Forbes*, both of Eureka, were with him on the briefs for the appellants.

J. Robert Wilson, general counsel, and *S. F. Fleeker*, assistant general counsel, were on the briefs, and *Clyde Milligan*, of Topeka, appeared as attorney of record for appellee state corporation commission.

Carl C. Chase, of Eureka, argued the cause, and *Jack D. Jones*, of Tulsa, Oklahoma, was with him on the briefs for appellee Tidewater Oil Company.

The opinion of the court was delivered by

ROBB, J.: This appeal is from the trial court's judgment, in an action for judicial review of a decision of the state corporation commission dated March 6, 1957, which judgment affirmed the order and decision of the commission.

Only a brief resume of the facts will be given, since the preliminaries were set out in sufficient detail when this case was previously before us (*Jackson* v. *State Corporation Commission*, 183 Kan. 246, 326 P.2d 280).

The temporary cease and desist order issued by the commission by reason of plaintiffs' complaint of the commission's order of July 27, 1953, granting Tidewater the right to repressure with salt water the wells on its leases, was set aside after a full hearing before the commission on the above complaint. At the completion of this hear-

ing, an order dated March 6, 1957, was entered, the substance of which is that on December 4, 1956, a complaint was filed alleging Tidewater's unlawful operation of its repressuring project resulting in waste prohibited by G.S. 1949, 55-601, on plaintiffs' adjoining lease; that pursuant to notice hearings were held and the matter taken under advisement; that along with rescinding the cease and desist order, the commission dismissed plaintiffs' complaint and made its memorandum opinion a part of its order.

Since the memorandum opinion is rather long we shall summarize only the pertinent contents. Plaintiffs' complaint, initiating the proceeding, alleged Tidewater's unlawful operation of its water flood project on its lease unit adjoining plaintiffs' leasehold on the Barrier property in Greenwood county, causing waste of natural resources in violation of G.S. 1949, 55-601; G.S., 1955 Supp., 55-121, and rules 82-2-102 and 82-2-121 of the commission, and plaintiffs would continue to be damaged thereby. Plaintiffs asked for an immediate order to cease and desist and a permanent modification of Tidewater's repressuring authority. Tidewater's repressuring authority on input wells bordering plaintiffs' lease was suspended pending public hearing which was held in Topeka on December 18, 1956, and continued on December 27, 1956. The factual situation giving rise to the questions involved is that primary development was begun by Tidewater in 1917 and in 1948 the average production rate of its eighty-nine wells in the field was 1.7 barrels per day. The initial water flood project in 1946 was some distance northeast of plaintiffs' lease. Secondary recovery operations began in early 1949 and have since been continued by Tidewater as well as others. Six of the other major operators were named. On April 3, 1952, plaintiffs obtained the Barrier lease for

three years but it provided for termination if no well were commenced on or before June 1, 1952. On May 31, 1952, plaintiffs commenced the drilling of a well by setting eighty-three feet of surface pipe in a hundred foot hole, forty-eight feet from the east boundary and sixty-one feet from the south boundary of the lease. They removed the derrick and did nothing more until April, 1954, when they released the lease above referred to and obtained another on the same and additional land. With the progress of water flood repressuring Tidewater on July 14, 1953, filed its application under G.S. 1949, 55-133, and commission rules 82-2-500 to 82-2-505, requesting authority to repressure and water flood the Bartlesville sand formation on its leases in eleven sections in Greenwood and Butler counties. No objections were filed thereto and in due time the application was approved, and the commission on July 27, 1953, granted the authority applied for. Tidewater had furnished a plat showing wells and leases within a one half mile radius and stated that copies of the application had been mailed to all operators, but plaintiffs' names did not appear on the plat or list as offset operators.

Tidewater developed its repressuring project at the rate of 100 acres per year until in early 1956 it had advanced to land adjoining plaintiffs on the east.

In April, 1954, plaintiffs started development, adjoining Tidewater, and between April 13, 1954, and October, 1956, drilled nine producing wells, six along their south boundary and three along the east boundary, the first being the well in the corner of their lease which had surface pipe set on May 31, 1952. All nine wells were heavily fractured and had produced a total of 100,000 barrels of oil. On May 15, 1956, Tidewater notified plaintiffs of its proposed adjacent water flooding, suggested cooperation and sharing of cost proportionate to acreage owned; but

plaintiffs neither approved nor joined in the proposed co-operative agreement for the secondary recovery project.

In July, 1956, Tidewater drilled three input wells in a line north and south and about twelve feet east of plaintiffs' east boundary and flooded two of plaintiffs' wells but upon issuance of the commission's temporary cease and desist order, Tidewater's input wells along plaintiffs' south and east boundaries were shut down.

The two questions before the commission were (1) whether Tidewater's water flood operations were lawful, and (2) had Tidewater, in connection with its application for repressuring authority, sufficiently complied with the notice requirement of subsection E of rule 82-2-502 of the commission providing that notice of the application shall be given to each operator of drilling or producing wells within a one half mile radius of the lease involved in the repressuring project, with subsection F providing that objections or complaints must be filed, and with subsection G providing that in the event any such objection or complaint is filed, a hearing shall be had after reasonable notice of the time, place and subject matter of such hearing has been given to the parties in interest.

The memorandum opinion continued that there was no requirement in the commission's rules for notice to adjoining lessees or landowners but only notice to operators of drilling or producing wells as above stated in subsection E. To require notice to plaintiffs would require an applicant to make a physical inspection of all adjoining leases to locate possible well locations, which would be untenable. The purpose of the notice requirement is to permit filing of objections so a public hearing can be had and the commission can decide whether the application should be granted. The filing of objections does not de-

feat nor assure denial of such application; it merely provides the objector with an opportunity to be heard prior to the commission granting or denying the application.

Then followed a discussion in regard to plaintiffs' complaint that Tidewater allowed the water to escape and flood plaintiffs' wells which would replace oil in the Bartlesville formation, create waste and irreparably harm plaintiffs.

The commission stated that Tidewater's operations were pursuant to G.S. 1949, 55-133-4 and commission rules 82-2-500 et seq. There was no claim or evidence of Tidewater exceeding its authority by its normal pattern of line injection wells used to confine the oil in the lease for production from a central well. One injection well eventually floods every producing well in the reservoir and the legislature was aware of this effect of repressuring when the authorizing statute was passed. G.S. 1949, 55-601, G.S. 1957 Supp. 55-121, and commission rules, 82-2-102, 82-2-103, and 82-2-121, relating to confinement of salt water encountered during drilling operations are inapplicable to repressuring activities. G.S. 1949, 55-133 and 55-134 and commission rules are still in full force and effect and provide—not for waste of natural resources—but for recovery and conservation of oil and gas which would otherwise be lost. Between 1949 and 1956, Tidewater had by its project produced 2,327,785 barrels of oil from approximately 900 acres of land and if normally continued, would show comparable production figures as to the leases here involved. Producing wells may be flooded out in repressuring activities but the oil is not lost; it is only pushed forward by the injected water and is still confined, awaiting capture. The commission's rule 82-2-101 as to correlative rights provides that no one pro-

ducer can be enriched to the detriment of other producers in a common source of supply by taking an undue proportion of the oil or gas obtainable therefrom, or by causing undue drainage between developed leases. The only way to prevent movement of oil from one lease to another and protect correlative rights is to place input wells along the boundary between.

The commission concluded that no waste of natural resources or injury to correlative rights were shown, it dismissed plaintiffs' complaint, and rescinded the temporary cease and desist order. Plaintiffs filed an application for rehearing which was denied by an order of the commission wherein the foregoing memorandum opinion was again referred to and adhered to.

Plaintiffs filed a petition for judicial review of the commission's ruling alleging facts as substantially set out in the commission's memorandum, challenging the correctness thereof, and further alleging that no application had ever been made to repressure within one half mile of plaintiffs' lease and the original order of July 27, 1953, did not grant Tidewater such authority. Therefore, the relief sought in their complaint of December 4, 1956, should be allowed and the 1953 order construed to prevent such repressuring in the Bartlesville formation within a half mile of plaintiffs' lease. Tidewater, upon motion, was allowed to intervene. It filed a short answer referring to evidence introduced before the commission, which was in support of the commission's findings of fact; that these findings in turn supported the commission's order; and the only matter before the trial court was whether there was any evidence to support those findings and decision.

The trial court's memorandum decision showed the matter was presented before the two judges of that judicial district, sitting *en banc*, who considered abstracts of the evi-

dence, the exhibits, and arguments of counsel and agreed with all the commission's findings and its decision—particularly as to notice. However, the court included a suggestion that more adequate notice could be sent to "*landowners in the vicinity and . . . any other person who* might be affected by the order." The trial court further stated that plaintiffs had now had their day in court and their correlative rights had been determined. In the formal journal entry of judgment the trial court affirmed the findings and decision of the commission.

The record here includes testimony of four witnesses for plaintiffs, three witnesses for Tidewater, and a number of exhibits. The hearing before the commission consumed at least parts of two days before its findings were made and before any dismissal was made of plaintiffs' complaint or the previous order temporarily directing Tidewater to cease and desist its repressuring process.

Plaintiffs contend that inadequate notice made the original order in 1953, of no force and effect as to them, the Barriers, or the land involved in their leases, and cite *Day* v. *State Corporation Commission*, 185 Kan. 165, 341 P.2d 1028; opinion denying rehearing, 185 Kan. 382, 345 P. 2d 651; *Matzen* v. *State Corporation Commission*, 185 Kan. 206, 341 P.2d 1031, opinion denying rehearing, 185 Kan. 404, 345 P.2d 630, but those cases are not analogous to our present case and in addition plaintiffs ignore *Stevens* v. *State Corporation Commission*, 185 Kan. 190, 341 P.2d 1021, which in requiring an amendment of a basic order before granting exceptions thereto, was an important element in the Day and Matzen cases.

Were plaintiffs successful in their contention the only practical result would be that another hearing before the commission would be in order, to be followed by the same procedure until the matter was again presented to

this court. This could go on *ad infinitum* but courts are committed to the eventual conclusion of litigation and when a litigant has had his day in court, and a correct determination has been made, that ends the matter. No authorities need be cited to support this elementary principle. In other words, the question of notice presented by plaintiffs in this particular sequence of facts and circumstances has become moot.

There yet remains the proposition as to whether there was any evidence to support the commission's findings of fact that were affirmed and adopted by the trial court. There was sharp controversy in the evidence which is apparent when we compare the testimony of George E. Jackson, one of the plaintiffs, with that of R. C. Earlougher, a consulting engineer from Tulsa. Jackson testified that Tidewater's engineer admitted to plaintiffs and the court that when it drilled the wells Tidewater knew the salt water would destroy plaintiffs' producing wells. Earlougher testified that Tidewater's input into four of its wells would ultimately cause migration of oil to plaintiffs' lease, but it had not done so to date. William H. McPhail's testimony was that it would be approximately four years before the benefit would inure to plaintiffs' lease. This is symbolic of most of the other testimony abstracted, all of which the commission weighed and therefrom made its findings which were affirmed by the trial court. Numerous comparable situations have confronted this court, the latest of which were *Davis-Wellcome Mortgage Co.* v. *Long-Bell Lumber Co.*, 184 Kan. 202, 336 P.2d 463, and *Davis-Wellcome Mortgage Co.* v. *Long-Bell Lumber Co.*, 184 Kan. 209, 336 P.2d 469. The result that was reached in those cases to the effect that a trial court's findings based on conflicting evidence are conclusive on appeal is fully applicable here.

We conclude the trial court was correct in affirming the findings of the commission, which findings were based on substantial competent evidence, and was likewise correct in affirming the decision based on those findings.

Affirmed.

APPENDIX "F"

Judgment.

Second Day, June Term, Friday, June 21st, 1963.

Before Honorable Alfred P. Murrah, Chief Judge, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the United States District Court for the District of Kansas be and the same is hereby affirmed in all respects except as to punitive damages, and the judgment of the United States District Court for the District of Kansas for punitive damages is reversed.

APPENDIX "G"

Kansas General Statutes 1949:

55-133. Injection of air, gas, water or fluids upon oil and gas properties; application required. The owner or operator of any well, or wells, which produces oil or gas from any sand, strata, or formation, shall be permitted, in the interest of oil and gas conservation, to introduce and in-

ject air, gas, water, or other fluid under pressure upon such sand, strata, or formation, for the purpose of recovering the oil and gas contained therein: *Provided*, That the owner or operator of a well into which water or other fluid is to be introduced into the sand, strata, or formation, shall make a written application to the state corporation commission for authority so to do, and written approval has been granted him by the state corporation commission: *And provided further*, That the operation shall be done under the rules and regulations of the commission. [L. 1935, ch. 212, § 1; March 19.]

55-134. Rules and regulations authorized. The state corporation commission is hereby directed to prescribe such rules and regulations as are necessary to carry out the provisions of this act. [L. 1935, ch. 212, § 2; March 19.]

55-606. Petition for rehearing; actions against commission; abstract to be filed; transcript; appeals to supreme court. Any action for judicial review of any rule, regulation, order or decision of the commission may be brought against the commission in the district court of any county in the state wherein the property affected thereby is located, or, if the property affected thereby is located in different counties, then the jurisdiction shall lie in either of such counties. Before any such action may be brought by a person who was a party to the proceeding resulting in the making of a rule, regulation, order, or decision of the commission, a petition for rehearing shall first be filed with the commission within ten days from the date of the making of the rule, regulation, order, or decision in question. A rehearing shall be granted or denied by the commission within ten days from the date said petition is filed and if rehearing be not granted within ten days it shall be taken as denied. If rehearing be granted the matter shall be set for hearing as promptly as shall be con-

venient, and shall be determined by the commission within thirty days after the same shall be submitted. Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. If no petition for rehearing be filed, then any person aggrieved who shall not have been a party to any such proceeding before the commission may bring an action for the judicial review of any such rule, regulation, order, or decision of the commission at any time after ten days and within thirty days from the date of the making of such rule, regulation, order or decision. Any rule, regulation, order or decision of the commission may be superseded by the district court upon such terms and conditions as it may deem proper. All actions brought under this section shall have precedence in any court and on motion shall be advanced over any civil cause of different nature pending in such court, and such action shall be tried and determined as other civil actions. In any such action an abstract of the record of all evidence and proceedings before the commission shall be filed by the complaining party and a counter abstract may be filed by the commission or any other interested party. The district court may, when it deems it necessary and in the interest of justice, remand any such action to the commission with directions that the same be further investigated or additional evidence taken by the commission. After making such further investigation or receiving such additional evidence the commission may change, modify or set aside the rule, regulation, order or decision in question, and if the party who instituted the action for review in the district court shall not be satisfied with such decision, then upon written request of any such party, the commission

shall make a report of its further investigation and final decision and send a certified transcript of such additional evidence as may have been tendered by any party in interest to the district court and thereupon the district court shall proceed to hear and determine the action upon the complete record. The court shall not be bound by any finding of fact made by the commission. The authority of the court shall be limited to a judgment either affirming or setting aside in whole or in part the rule, regulation, order or decision of the commission. Appeals to the state supreme court may be taken from the judgment of the district court as in other civil actions. Nothing herein shall be construed in any manner to change, restrict, prohibit, or to deny to any person any of the usual equitable remedies. [L. 1931, ch. 226, § 6; L. 1939, ch. 227, § 5; March 30.]

APPENDIX "H"

General Rules and Regulations for the Conservation of Crude Oil and Natural Gas Issued by the State Corporation Commission of the State of Kansas.

Rule 82-2-101

DEFINITIONS

The following terms used herein are defined as follows:

* * *

Correlative Rights shall mean that each owner or producer in a common source of supply is privileged to produce therefrom only in such manner or amount as not to injure the reservoir to the detriment of others or to take an undue proportion of the oil or gas obtainable therefrom, or to cause undue drainage between developed leases.

* * *

Rule 82-2-500

WATER FLOODING; APPLICATION AND APPROVAL

The owner or operator of any well may inject water or other liquids under pressure into the formation containing oil or gas for the purpose of obtaining oil or gas from the reservoir, upon application to and approval by the Commission. [Authorized by G.S. 1935, 55-133, 134; compiled, December 31, 1947.]

Rule 82-2-501

SAME; CASING AND CEMENT

Wells used for the injection of water into the producing formation or repressuring wells shall be cased with sound casing so as not to permit leakage and the casing cemented in such manner that damage will not be caused to oil, gas or fresh-water resources. [Authorized by G.S. 1935, 55-134; compiled, December 31, 1947.]

Rule 82-2-502

SAME; APPLICATION, CONTENTS, NOTICE, OBJECTION, HEARING AND APPROVAL

A. No liquids shall be injected into a well for flooding purposes until so ordered by the Commission pursuant to application and notice as herein required.

B. The application shall be verified and filed in triplicate with the Commission, showing: (1) the location of the intake well; (2) the location of all oil and gas wells, including abandoned and drilling wells and dry holes, and the names of landowners and lessees within one-half mile of the intake well; (3) the formations from which wells are producing or have produced; (4) the name, description and depth of the formations to be flooded; (5) the open-

hole depths of each formation to be flooded; (6) the elevations of the top of the oil-or-gas-bearing formation in the intake well and the wells producing from the same formation within one-half mile radius of the intake well; (7) the log of the intake well or such information as is available; (8) descriptions of the intake well casing; (9) descriptions of the liquid, stating the kind, where obtained and the estimated amounts to be injected daily; (10) the names and addresses of the operators notified of the application and the date that such notice was given; (11) such other information as the Commission may require to ascertain whether the flooding may be safely and legally made. Application forms may be obtained from the Conservation Division.

C. Applications may be made to include the use of more than one intake well on the same lease or on more than one lease.

D. Applications shall be executed by all operators who are to participate in the proposed flooding plan.

E. Notice of application shall be given by the applicant by mailing or delivering a copy of the application to each operator of drilling or producing wells within one-half mile radius of the proposed intake well. Such notice shall be mailed or delivered on or before the application is mailed to or filed with the Commission.

F. Objections or complaints, stating the reasons why the proposed plan as contained in the application may cause damage to oil, gas, or fresh water resources must be filed within ten days after the application is filed.

G. In the event any such objection or complaint is filed or the Commission on its own motion deems that there should be a hearing on the application, a hearing shall be

had after reasonable notice of the time, place and subject matter of such hearing has been given to the parties in interest.

H. Orders approving the flooding plan will not be made within ten days of the filing of the application unless the written consent of all persons entitled to notice is filed with the Commission within such time. [Authorized by G.S. 1935, 55-134; compiled, December 31, 1947; amended April 20, 1957.]

Rule 82-2-503

SAME: NOTICE OF COMMENCEMENT AND DISCONTINUANCE OF FLOODING OPERATIONS

A. Immediately upon the commencement of flooding operations the applicant shall notify the Commission of the same and the date of commencement.

B. Within ten days after the discontinuance of flooding operations the applicant or the one in charge thereof shall notify the Commission of the date of such discontinuance and the reasons therefor.

C. Before any intake well shall be abandoned notice shall be served on the Director and the same procedure shall be followed in the plugging of such well as provided for the plugging of oil and gas wells. [Authorized by G.S. 1935, 55-134; compiled, December 31, 1947.]

Rule 82-2-504

SAME: RECORDS

The owner or operator of an intake well shall keep an accurate record of the amount of liquid injected into the intake well, and such information shall be made avail-

able to the Commission or its agents. [Authorized by G.S. 1935, 55-134; compiled, December 31, 1947.]

Rule 82-2-505

SAME; ASSESSMENT OF COSTS

The applicant shall, within 30 days after notice by the Corporation Commission, pay to such Commission $15 where only one lease is involved in the application, and in addition thereto $5 for each additional lease involved. [Authorized by G.S. 1935, 55-135; compiled, December 31, 1947.]

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 486

TIDEWATER OIL COMPANY,
Petitioner,

vs.

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As Jackson Brothers,
Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

TIDEWATER OIL COMPANY,
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vs.

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As Jackson Brothers,
Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete. In summary form, the operative facts (found by the Trial Court and not disturbed on appeal) are as follows:

Respondents (called Jackson Bros.) are two brothers engaged in business as small independent drillers. In 1952, they commenced a well on a tract of land adjoining a large block of producing leases owned and operated by petitioner (called Tidewater). Because of limited finances, it took Jackson Bros. two years to finish drilling their first well. When finally completed however, the well was

a good one for the area, capable of making about fifty barrels of oil per day without any salt water. (A1-A3)[1] From 1954 to 1956, Jackson Bros. drilled eight more wells on their property, all of which were good wells ranging in productive capability from 40 to 90 barrels of oil per day per well. Only two of the wells made any salt water at all and they produced collectively, only 20 barrels of water per day. (A2)

At this juncture, Tidewater proposed that Jackson Bros. join in establishing a line of salt water injection wells along their common boundary. The wells on Tidewater's leases were twenty to thirty years old, had been depleted to the limit of primary production and were ready to be waterflooded. (A3-A5) Jackson Bros. refused to join in the project, and properly so, because it would have cost them $100,000 and would have damaged rather than benefited their wells which were still in the first stages of primary production. (A5-A6) Of course, it would benefit Tidewater to have its neighbor bear part of the expense of their waterflood injection program.

The refusal of Jackson Bros. to join in the line flood proposal was followed by a most extraordinary series of willful and deliberate acts by Tidewater engineers amounting to nothing less than a reprisal against a small operator who refused to follow the dictates of a major company. Under the pretense of making an offer to purchase the Jackson Bros.' property Tidewater engineers obtained copies of the Jackson Bros.' well logs. (A6) With this information in hand, Tidewater engineers drilled three wells as close to the Jackson Bros.' boundary as it was possible to move a rotary drilling rig. (A6-A7) The wells were[2]

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1 References to the record will be shown by page number in the Appendix to petitioner's brief.

2 Two wells were located 12' and one well 20' from the property line.

then completed in the same formation interval from which Jackson Bros.' wells produced and in the summer of 1956, Tidewater commenced to inject salt water at rates ranging from 300 to 600 barrels of water per day per well. (A7-A8)

The effects were immediate and disastrous. One of the Jackson Bros.' wells was flooded out within hours (A7); a second was flooded out within weeks. (A8) Jackson Bros. pleaded with Tidewater to shut down the injection wells, but the engineers and high officers of the company refused, although they had full knowledge of the damage being done. (A8)

Later, and after the decision of the Kansas Corporation Commission, Tidewater converted three of its own producing oil wells offsetting the south border of the Jackson Bros.' property to water input wells and commenced the same high rates of water injection along that boundary." (A10-A11)

In approximately 3½ years that intervened between the commencement of water injection and the trial of the damage suit in the Federal District Court, Tidewater injected almost one million barrels of salt water on the plaintiffs' property lines. (A11) The rates of injection maintained in these wells were, the Court found, "substantially in excess and frequently twice as high as the average rates of injection in similar wells on the surrounding property." (A12) At one point, to administer the *coup de grace* to two of Jackson Bros.' wells, Tidewater injected salt water at rates ranging from 1,000 to 1,400 barrels per well per day. (A14) This is to be compared with average water injection rates of approximately 110 barrels per day per well maintained by Tidewater on a nearby lease, where the only object was to conduct a waterflood, not flood out

neighbor's wells. (A12) In the same 3½-year period, Tidewater completely destroyed four of Jackson Bros.' wells and forced five more to the limit of economic production by reason of the excessive quantities of water they were forced to produce with the oil. In effect, by the time of trial, all nine of the original Jackson Bros.' wells had been destroyed. (A15-A16) Worse, yet, Jackson Bros. drilled six additional wells in the interior of their lease to replace those which were destroyed by salt water, but have had to continue to produce several of the original nine wells making enormous quantities of salt water in order to keep the salt water injected by Tidewater from invading and flooding out the interior wells. (A16)

Tidewater's officers and engineers were forced to admit at the trial, and the Court found, that they knew the Jackson Bros.' wells would be damaged by their injection program in the line wells and that the rates of injection maintained were excessive and unreasonable. (A20) In addition, the Trial Court concluded that the destruction of the Jackson Bros.' wells could have been avoided without additional expense or loss to Tidewater if it had initiated a reasonable line flood program and had employed moderate injection rates. (A19-A21)

The Trial Court found Tidewater guilty of a deliberate injury to Jackson Bros.' property, a tort consisting of conduct which was "without justifiable excuse and with a reckless and wanton disregard of the rights and property of the plaintiffs; and [that] the injury to the plaintiff's property could have been, and was in fact, foreseen and anticipated." (A20)

The foregoing is only a summary of the operative facts found by the Trial Court. The Findings of Fact (A1 to A21 of the Appendix) describe the factual situation in complete detail and we invite the Court's examination of

them for a better understanding of what occurred and the conclusions drawn by the Trial Court on the intent and conduct of Tidewater's officers and engineers.

It is true that on July 29, 1953, Tidewater obtained from the Kansas Corporation Commission, an order authorizing it to inject salt water for waterflooding purposes on the large block it owned in the area. The waterflood order did not, however, specify a location for any injection wells offsetting Jackson Bros.' property and at the time it was obtained, the Jackson Bros. had no producing wells on their property and were intermittently engaged in drilling their first well. The flood order was obtained without notice to Jackson Bros. (A4) It is also true that when Tidewater commenced water injection along the property line and the damage to the first of Jackson Bros.' wells became apparent, they initiated a proceeding before the Kansas Corporation Commission to obtain an order directing Tidewater to cease water injection.[1] (A41)

After a hearing, the Commission dismissed the proceeding brought by the Jackson Bros. and dissolved a temporary cease and desist order. However, contrary to what Tidewater now seeks to imply, the Commission did not determine that there was no injury to the Jackson Bros.' wells or property. It is clear in the opinion that the Commission denied relief to the Jackson Bros. on the following basis:

1. The jurisdiction of the Commission is limited by statute to conservation matters, viz.: the prohibition of waste in the production of oil and gas and the protection of correlative rights. (A45; A51)

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1. At this point, and at the time of the hearing before the Commission, Tidewater had just commenced injection and only a small fraction (6% to 7%) of the one million barrels had gone into the well.

2. No question of waste of natural resources was involved in the proceeding because, while producing wells might have flooded out, the oil was not lost but was pushed forward in the reservoir in which it was still confined and waiting to be captured. (A50)

3. The theory of correlative rights relates to withdrawals of oil or gas in such quantities as to injure the reservoir or result in disproportionate recovery by one operator (commonly called drainage between leases) which has never been the claim here. (A50-A51)

4. The Commission is not a proper forum to consider and determine claims for compensation or damage for injury to property and there was no justiciable controversy presented under the conservation laws. (A47-A48; A50-A51)

The Commission, in its Memorandum Opinion suggested that an action for damages for the flooding of producing wells might be available to the Jackson Bros., but must be brought in a Court of general jurisdiction. (A50)

Jackson Bros. carried the appeal from the Commission's ruling to the Supreme Court of the State of Kansas, which affirmed the findings and order of the Commission without any new issue in the case and on the same theories of law. The Supreme Court adopted the same "narrow" construction of the concept of correlative rights as being limited to questions of disproportionate withdrawals by producers from a common reservoir. (A59-A60)

SUMMARY OF RESPONDENTS' ARGUMENT

Respondents will argue that the judgment of the Court of Appeals is not in conflict with applicable State law, and certiorari ought not to be granted, for the following reasons:

1. Petitioner's entire argument is based on the erroneous proposition that the phrase "injury to correlative rights" is synonymous with "injury to property" in all forms. In fact, "correlative rights" is a term of very limited scope in the field of conservation of natural resources and bears no relationship to any of the elements of damage on which recovery in this case was based.

2. While petitioners have failed to cite a single authority from Kansas in support of their argument that the decision of the Court of Appeals was contrary to Kansas law, there are several cases in point which hold:

(a). An action for injunctive relief, such as the complaint to the Commission for a cease and desist order, is not a bar to a later action at law for damages between the same parties and on the same set of facts.

(b). Under Kansas law, administrative tribunals do not enjoy equal standing with courts of general jurisdiction and cannot render binding judgments on legal questions or adjudicate issues and rights of parties which are not wholly within their special area of competence or jurisdiction.

There is one recent Kansas case (*Renner v. Monsanto Chemical Co.*, 187 Kan. 158; 354 P.2d 326, squarely in point, which holds that the oil and gas conservation statutes and the conservation orders of the Corporation Commission provide no basis for the conclusion or implication that they supersede or bar the common law or traditional right of an aggrieved party to redress in courts of general jurisdiction.

3. It is the law in Kansas and other jurisdictions that the mere fact that an act was lawfully undertaken, as was the case with Tidewater's salt water injection

under the Commission waterflood order, does not relieve the actor of liability for harmful consequences of the act. This is especially true where the act is lawful under some statute of limited application such as oil and gas conservation statutes, but is also tortious and done with the deliberate intent to injure the property of another, which the Court found is the case here.

4. The judgment of the Court of Appeal in this case was that since the Kansas Corporation Commission possessed no power to adjudicate tort liability, the proceeding before the Commission and the Commission's order could not have the effect of depriving Jackson Bros. of their day in court for the injury to their producing oil and gas property and the wells located thereon. This is wholly in accord with the law in this State and elsewhere.

ARGUMENT.

We note, with some admiration, that counsel for petitioner Tidewater, have composed six apparently different statements of questions presented for review. In reality, however, there is but one question in this case and it is:

> Whether the order of the Kansas Corporation Commission (affirmed on appeal) dismissing a complaint for a cease and desist order to enjoin the continued injection of salt water along the boundary of a producing oil lease under a waterflood permit previously issued by the same Commission, is a bar to a later action for damages to the adjoining property and the wells located thereon, caused by the continued injection of water?

Similarly, there can be only one basis for invoking the jurisdiction of the Court on certiorari under Rule 19 which is:

Th.t the Court of Appeals which held (as did the Trial Court) that the Commission's order was not a bar, decided the question contrary to applicable State law.

There are several reasons why the decisions of the Court of Appeals and the District Court, on the basic issue, are both correct and in harmony with State law. These will be discussed under separate sub-topics.

1: The Commission's Determination That There Was No Injury to Correlative Rights Shown Was Not Tantamount to a Finding That There Was No Damage to Jackson-Bros.' Property.

Without saying so, counsel for Tidewater have, throughout their brief, used the term "correlative rights" as if it were synonymous with property or property rights.[1] From this point, the argument is made that the award of compensatory damages for injury to the Jackson Bros.' producing oil property and the wells thereon is necessarily and completely at odds with the finding of the Commission that no injury to [Jackson Bros.] correlative rights had been established. The Memorandum Opinion by the Commission leaves no room for such a play on words. In substance the general rules of the Commission define correlative rights as the right of each producer in a common reservoir to produce [withdraw oil or gas] only in such manner or amount as (1) Will not injure the reservoir; or (2) Cause undue drainage between developed

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1 In the first statement of the questions presented for review (Petitioner's Brief Page 3), Petitioner has invented the term "correlative property rights." The word "property" is not used in association with the term "correlative rights" in the conservation statutes, the rules of the Kansas Corporation Commission or in its opinion included in the Appendix.

leases.[1] In its opinion, the Commission gave this rule a strict literal interpretation so as to hold that Jackson Bros. had not stated or proved a cause of action under the Conservation laws and within its jurisdiction. The Commission said:

> "There is no ambiguity in the language of this definition. The theory of correlative rights relates to the *withdrawal* of gas or oil from a common reservoir in amounts disproportionate to the interest of the lessee owners.[3]
>
> The question of *withdrawals* from the common reservoir is not presented in this complaint involving the flooding of producing wells by water injected during a lawful waterflood operation.[2]
>
> * * *
>
> No waste of natural resources nor injury to correlative rights having been shown, it appears that the instant proceeding presents no justiciable matter for action by this Commission." (A51)

The Commission did not decide, nor did it imply, that injury to correlative rights is the only injury which may be done to a producing oil and gas property, for the Commission also said:

> "A hearing before this Commission is not a proper forum for allegations of compensatory damage inasmuch as Commission jurisdiction is by statute limited to the prohibition of waste in the production of crude oil and natural gas and the protection of correlative rights." (A47-A48)

* * *

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1. Rule 82-2-101; A50-A51.

2. The word "collateral" in the record at A51 should be "correlative".

3. Emphasis supplied.

> An action for damages for the flooding of producing wells may be available to the owners of such wells, but the forum for such a damage action is the courts, not this Commission." (A50)

Jackson Bros. did not contend in the damage suit brought in the United States District Court that they were entitled to recover by reason of either (1) injury to the reservoir; or (2) drainage of the Jackson Bros.' property by Tidewater. Recovery was not granted on either of these theories. The Trial Court made a detailed finding on this subject to the effect that the tortious injury to Jackson Bros.' property caused the following damage: (1) Increased equipment and operating expense due to the necessity of lifting and disposing of excessive quantities of water; (2) Loss of natural gas fuel for the pumping wells; (3) Acceleration of the time when the economic limit of production would be reached; (4) The destruction and loss of producing wells on the Jackson Bros.' property; and (5) The loss of substantial quantities of recoverable oil under the Barrier lease which was by-passed and watered off in the reservoir by the salt water injected by Tidewater. (A18)

In broad terms, one might be inclined to consider that the flooding of a producing well or the watering off of oil reserves could be classed as an injury to the reservoir, but the Commission held to the contrary when it said:

> "Producing wells may be flooded out in repressuring operations, but the oil is not lost; it is pushed forward by the injected water which displaced it in the reservoir. There is, therefore, no waste of the natural resource; it is still confined, waiting to be captured." (A50)

At this point in the opinion, the Commission observed that an action for damages might be available in the Courts,

The Court of Appeals was fully aware of the distinction between injury to "correlative rights," as narrowly defined by the Commission, and damage to property for which the Jackson Bros. were permitted to recover by the Trial Court. (A28)

"Once it is recognized that the phrase "injury to correlative rights" cannot be equated with the generally understood and broad concept of injury to property, the logic of petitioner's argument falls, for it is based on an erroneous premise. Not only the Court of Appeals and the District Court, but the Commission as well, cognized that the Commission had no jurisdiction to entertain claims for damage to property.[1] (A47-A48; A50-A51) It had no jurisdiction to determine and did not purport to pass upon the questions tried in the District Court.

On this issue the petitioner must fall victim to its own sword. If the rules of res judicata and estoppel by judgment have any application in this case, it must be to the disadvantage of Tidewater. In view of the Commission's determination that, notwithstanding the fact that producing wells owned by Jackson Bros. had been flooded out and the oil pushed ahead of the inrush of salt water, no justiciable controversy was presented under the conservation laws, Tidewater is in no position at this juncture, to contend that a determination that no injury to correlative rights has been shown is as broad as a finding that there was no damage to Jackson Bros.' property. Furthermore

1. The Trial Court's findings show that Tidewater did not rely upon the Commission to adjudicate its tort liability. At the time it started drilling the line wells, Tidewater, anticipating the damage it would do, sent one of its engineers to the Commission to inquire whether the water-flood permit would protect it from a claim for damages to Jackson Bros.' wells. The Commission refused to be committed on this question. (A9)

we must not overlook the fact that the Commission, in its opinion, affirmed by the Supreme Court, said: "An action for damages for the flooding of producing wells may be available to the owners of such wells but the forum for a damage action is the Courts, not this Commission." (A50). The Commission's order certainly must now be res judicata on what it had jurisdiction to hear and what it actually decided. If it is, Tidewater cannot argue that the Commission's order disposed of Jackson Bros.' claim for damages; for that matter has already been adjudicated against the petitioner.

2. The Decisions of the Court of Appeals and the District Court on the Issue of Estoppel by Judgment Are Not in Conflict with Applicable State Law.

Perhaps the Court has noticed that except for the opinion of the Supreme Court of Kansas in the appeal of the Commission proceeding (*Jackson* v. *State Corporation Commission*, 186 Kan. 6, 348 P.2d 613), counsel for petitioner have not cited a single Kansas decision to support their claim that the judgments of the Court of Appeals and the District Court holding that the Commission's order was not a bar to the damage suit are in conflict with applicable State law. This is the pivotal question at this stage in the proceeding. It is not because of a lack of decisions on the point that counsel for petitioner have failed to support their argument. There are several cases in point and the reason they were not cited is because they are squarely against the petitioner. The pertinent decisions fall into two categories and will, therefore, be reviewed separately.

(a) Under Kansas Law, an Action for Injunctive Relief Is Not a Bar to a Later Action for Damages on the Same Facts.

The complaint by Jackson Bros. to the Corporation Commission for a cease and desist order was nothing more than an application to an administrative body for injunctive relief. There was no prayer or claim for damages in the complaint to the Commission. (A41) Moreover, the Commission ruled that it had no jurisdiction to consider a claim for damages. (A27-A48) The rule is firmly established in this State that proceedings for injunctive relief do not bar a later suit for damages arising out of the same transaction.

A recent case directly in point is *Hoistetter* v. *Myers Construction, Inc.*, 170 Kan. 464, 227 P.2d 115 (1951). In that case a damage suit was brought for pollution of air by smokestack refuse from a portable asphalt plant. An adjoining householder claimed damage to his home. The defendant attempted to set up in defense a prior decree in an injunction suit between the same parties on the same nuisance. The defense was stricken on plaintiff's demurrer. The Supreme Court noted (p. 468 Kan. Rep.):

> "We have seen the trial court in the injunction action found many of the issues of fact adversely to the contentions of the plaintiffs in the damage action."

* * *

(p. 470)

> "* * * the only issue litigated in the injunction action was whether the plaintiffs in that action were entitled to certain equitable relief. The question of damages for the period of time for which damages were claimed in the damage action was not litigated. Without deciding whether an action for damages and an action for an injunction may be joined, suffice it to say that

> they were not joined in this case and in the injunction action there was no claim for damages, no evidence as to damages, and no finding as to damage. The demurrer to the supplemental answer was correctly sustained."

To the same effect is *The Chanute Brick & Tile Company* v. *The Gas Belt Fuel Co.*, 89 Kan. 177, 130 Pac. 649, where the court, in a per curiam decision, said:

> "The only issue litigated in the former action was whether the brick company was entitled to certain equitable relief. The question of damages for failure to furnish gas was not considered. The former judgment therefore could not be pleaded as a defense to the present action."

It may be true that a contrary rule exists in other jurisdictions as indicated by some of the cases cited by petitioner from other states, but the rule in *Hoistetter* has been consistently applied in Kansas.[1]

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1. *Stroup* v. *Pepper*, 69 Kan. 241, 79 Pac. 825; *Atchison & Eastern Bridge Co.* v. *Atchison County Commissioners*, 150 Kan. 24, 91 P.2d 34; *Smith* v. *Russ*, 184 Kan. 773, 339 P.2d 286; *Haynes Hardware Co.* v. *Western Casualty & Surety Co.*, 156 Kan. 356, 366, 133 P.2d 574; *Probst* v. *Weigand*, 133 Kan. 232, 236, 299 Pac. 611; *Kinsey* v. *Farmers State Bank*, 132 Kan. 694, 700, 297 Pac. 693; *Brinkerhoff* v. *Home Trust & Savings Bank*, 109 Kan. 700, 705, 205 Pac. 779. In the latter case, the Court quoted the following from a work on estoppel:

> "For estoppel by judgment results from a matter having been directly and substantially in issue in a former suit, and having been heard and finally decided."

See also: *Security Insurance Company of New Haven* v. *Johnson*, 276 F.2d 182, 186-187 (10th Cir. 1960); Scott, *Collateral Estoppel by Judgment*, 56 Har. L. Rev. 1; 29 (1942)

(b) Under Kansas Law, Administrative Proceedings Do Not Constitute a Bar or Estoppel to Actions in Courts of General Jurisdictions.

Again, whatever may be the rule elsewhere, it has been established in Kansas that administrative bodies (and specifically the Kansas Corporation Commission) do not have authority to render binding judgments on legal questions.[1] In *Gas Service Co.* v. *Consolidated Gas Utilities Corporation*, 145 Kan. 423, 65 P.2d 584, two utilities prosecuted several actions to determine conflicting claims to service territory in the City of Wichita. In the case cited, an attack was made upon the validity of a City Ordinance on which one utility relied. This attack was met with the defense that the validity of the Ordinances had been passed and adjudicated in a prior case between the same parties carried to the Supreme Court. In rejecting the defense, the Supreme Court of Kansas said (P. 435 Kan. Rep.):

> "Even if the question of whether the Ordinances had been passed in conformance with the statute had been presented to the Commission, the decision of that tribunal on the question would not have had the binding effect of a judicial determination. Administrative bodies such as utilities commissions are not courts and do not have authority to render binding judgments on legal questions."[2]

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1. This is not to say, as the Court of Appeals observed (A30), that an administrative tribunal may not render a binding judgment in areas wholly within its jurisdiction; but, on the other hand, an administrative tribunal in this State cannot bind litigants on issues outside its jurisdiction or question of law not within its special competence.

2. The Commission referred to is the Kansas Corporation Commission, then called the Public Utilities Commission which regulates public utilities, common carriers and administers the conservation laws of this State.

Similarly, the Supreme Court of Kansas held earlier, in *State ex rel. v. Public Service Comm.*, 135 Kan. 491, 495, 11 P.2d 999:

> "As generally understood a court is a judicial tribunal which has power to hear and decide justiciable controversies and to give binding judgments thereon. The powers conferred on the commission by the statute under scrutiny do not extend so far. By its terms the commission is authorized to investigate complaints concerning unjust rates which the carriers have exacted and to make a certificate as to what is or would have been a just rate; but the commission is not authorized to make binding adjudications of right between carrier and complainant."

A very recent case squarely in point, and in the area of the commission's administration of the oil and gas conservation laws, is *Renner v. Monsanto Chemical Co.*, 187 Kan. 158, 354 P.2d 326. A landowner brought an action to cancel an oil and gas lease insofar as it covered a twenty-acre tract of land for violation of the implied covenants to develop the property and protect it against drainage from offset wells. The Trial Court entered an alternative decree giving the lessees 120 days to drill and complete a well or forfeit the lease.

On appeal, the defendants asserted, as an impregnable defense, that an order of the Corporation Commission had been entered under the proration statutes attributing the twenty-acre tract in question to producing wells located elsewhere on the lease. The well spacing pattern set up by the lessees had been submitted to the Commission and approved by it and the acreage in question was attributed to wells under the proration formula and allowables assigned accordingly. Therefore, it was argued, the lease was fully developed with all locations drilled and, as a

matter of law, the lessees had no further obligation to drill on the property.

The Supreme Court refused to accept this defense. It pointed out that the Commission had limited jurisdiction and that the conservation statutes empowered the Commission to attribute acreage to producing wells and fix allowables only for the purpose of preventing waste and protecting correlative rights. The Court went on to say (p. 174, Kan. Rep.):

> "We think it clear that, from a consideration of the statute, oil proration orders of the Commission do not in any manner alter the lessee's obligation under the implied covenant to drill additional wells to protect the premises against drainage. Manifestly, the statute provides no basis for the supersession of that duty, and affords no inference that a landowner must submit to uncompensated drainage without the possibility of exacting protection from his lessee."

If the conservation laws afford no inference that a landowner must submit to uncompensated drainage of oil and gas from under his property, it is difficult to imagine why the same statutes would require that an adjoining property owner, be he lessee or landowner, must be required to submit to the negligent or willful destruction of his property through the injection of water under a flood order. The question of drainage across lease lines through withdrawals of oil or gas on adjoining property is more closely connected with the concept of correlative rights as expressed in the conservation laws than is the movement of oil across lease lines occasioned or prevented by the injection of fluids for repressuring purposes.

In the final analysis, *Renner v. Monsanto Chemical Co.* stands for the proposition that the Supreme Court of Kansas is unwilling to hand over to the Corporation Com-

mission the traditional jurisdiction and remedies of courts of general jurisdiction in this State. We submit, this is as it should be. It has been the attitude of courts in other jurisdictions.[1] Consistent with this general policy, our Supreme Court has repeatedly held that the rule of res judicata (a rule which is broader than estoppel by judgment) does not apply to decisions of administrative bodies.[2]

3. The Fact That the Operation of the Water Injection Wells Was Lawful under the Oil and Gas Conservation Laws Is Not a Defense to an Action for Damages to Adjoining Property Caused Thereby.

When correctly analyzed, the opinion of the Kansas Corporation Commission held only that the injection of water in the wells along the property line was lawful under the conservation statutes and the rules of the Commission. (A50-A51) But, as the Court of Appeals said, "the fact that an act is lawfully undertaken and lawfully done, does not, *ipso facto*, relieve the actor of liability for the harmful consequences of his act." (A32) This is unquestionably

1. "*Lone Star Gas Co.* v. *Murchison*, (Tex. Civ. App.) 353 S.W.2d 870, 881; *Magnolia Petroleum Co.* v. *Railroad Comm.*, 141 Tex. 96, 170 S.W.2d 189. In the *Murchison* case, the Court said: 'The Railroad Commission is nothing but an administrative body appropriately clothed with authority to perform salutary functions of economic nature for the conservation of natural products. Its function is to administer conservation laws only and not to take the place of courts in their historical jurisdictional field.' (p. 881). *See Bills* v. *LeFlore County Gas & Electric Co.*, 166 Okla. 130, 26 P.2d 149, 151 (Okla.)."

2. *Coffman* v. *Hall*, 107 Kan. 188, 190 Pac. 761; *Kurn* v. *Miami County Commissioners*, 141 Kan. 7, 39 P.2d 321; *Warburton* v. *Warkentin*, 185 Kan. 468, 345 P.2d 992.

the law in Kansas and for that reason, if for no other, the opinion of the Court of Appeals is clearly in accord with the applicable State law, not in conflict with it.

In *Helms* v. *Eastern Kansas Oil Company*, 102 Kan. 164, 169 Pac. 208, a plaintiff instituted a suit for damages to his farm resulting from the escape of oil and sediments from the defendant's refinery, located on adjoining property, into a water course which passed across the plaintiff's land. The defendant interposed the defense that since it was conducting a lawful business on its own property it could not be held liable, particularly since the plaintiff failed to show negligence. On this issue the Supreme Court of Kansas quoted *Hauck* v. *Pipe Line Co., Ltd.*, 153 Pa. St. 366, 375 (p. 168 Kan. Rep.):

> "If the mere fact that the business is a lawful business, and has been conducted with care, would be a defense where a neighbor's land had been injured in consequence of the business carried on there, the escape of gas for instance, or the escape of oil, the result would be that a man might lose his farm; might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business, and was carried on carefully. This is not the law. No man's property can be taken, directly or indirectly, without compensation under the law of this state. Hence, there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful, and he has exercised care in carrying it on."

In another line of cases the Supreme Court of Kansas has held that one using dynamite will be held responsible for damage to adjoining property from shock or debris, and this is true even where, as in the case of railroad companies, a permit has been obtained from the City Engineer, or other in authority, after tests had been made to determine

that blasting can safely and legally be done. *City of Cherryvale* v. *Studywin*, 76 Kan. 285, 91 Pac. 60; *Rost* v. *Railroad Co.*, 95 Kan. 713, 149 Pac. 679; *Bacon* v. *Railway Co.*, 109 Kan. 234, 198 Pac. 942.

There are many similar examples from other jurisdictions (several involving oil and gas cases) where defendants engaged in otherwise lawful activities, have been held accountable for damage to adjoining property. *Gulf Oil Corporation* v. *Hughes*, 271 P.2d 81 (Okla.); *West Edmond Salt Water Disposal Corporation* v. *Rosecrans*, 204 Okla. 9, 226 P.2d 965; *West Edmond Hunton Lime Unit* v. *Lillard*, 265 P.2d 730 (Okla.); *City of Muskogee* v. *Hancock*, 58 Okla. 1, 158 Pac. 622; *Comanche Duke Oil Co.* v. *Texas Pacific Coal & Oil Co.*, 298 S.W. 554 (Tex. Civ. App.); *Atkinson* v. *Virginia Oil & Gas Co.*, 72 W. Va. 707, 79 S.E. 647; *Miles* v. *A. Arena & Co.*, 23 Cal. App. 680, 73 P.2d 1260; *Parks* v. *Atwood Crop Dusters*, 118 Cal. App. 368, 257 P.2d 653; *Petillo* v. *Kennedy & Smith, Inc.*, 31 N.Y.S.2d 481; *Green* v. *General Petroleum Corporation*, 205 Cal. 328, 270 Pac. 952; *Higgins Oil & Fuel Co.* v. *Guaranty Oil Co.*, 145 La. 233, 82 So. 206.

4. The Judgment of the Court of Appeals That the Commission, Which Possessed No Power to Adjudicate Tort Liability, Could Not Deprive a Tort Claimant of His Day in Court Is Not in Conflict with State Law.

We do not understand petitioner to challenge the accuracy or the finality of the Commission's conclusion that it was without jurisdiction to consider or render judgment on claims for damages on injury to property. (A50) Neither does the petitioner assert, categorically, that an administrative agency, cloaked only with authority to consider controversies under the oil and gas conservation

laws, can authorize one producer to destroy the property of another, willfully or negligently, without responsibility for the tortious act. Counsel have carefully avoided a bold statement on this issue for the plain reason that it would place them completely at odds with the constitutional prohibition that "no man's property can be taken directly or indirectly without compensation." *Helms* v. *Eastern Kansas Oil Company*,[1] *supra*.

The Court of Appeals recognized that petitioner's weasel-worded argument that the determination of Jackson Bros.' "correlative rights" by the Commission was tantamount to a final adjudication of every issue in the damage action led inescapably to the announcement of a rule that no court has yet been willing to embrace: "That a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that issue, by conclusive adjudication of the operative facts upon which his claim must rest." (A32) Petitioner has not cited one case from Kansas or from any other jurisdiction which goes so far. The view expressed by the Court of Appeals is not only clearly in accord with the law in Kansas, but in harmony with the most fundamental notions of justice and fair play. *Helms* v. *Eastern Kansas Oil Company*,[2] *supra*; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 18 *et seq*.

CONCLUSION

Although the amount of the judgment is large, the fact remains that this is nothing more than a tort suit between private litigants, brought in Federal Court on diversity

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1. 102 Kan. 164, 169 Pac. 208.

2. 102 Kan. 164, 169 Pac. 208.

jurisdiction. It is of no consequence to anyone except the plaintiffs and the defendant. The alleged conflict between the judgments of the Federal Courts and the Kansas Corporation Commission is, like petitioner's interpretation of "correlative rights", manufactured for the benefit of Tidewater; a product of the ingenuity of imaginative counsel. The Kansas Corporation Commission is not a party to this action and it is not concerned with it. The Commission's order has not been attacked nor has the waterflood, for which it issued a permit, been enjoined or interfered with. The Commission has not sought to intervene, appear or file briefs at any stage in this litigation.

We submit that petitioner has come to invoke jurisdiction of the Court with a petition and an argument which do not accurately and fully present the law of Kansas. Petitioner has failed to sustain the burden of showing that the judgments of the Court of Appeals and the District Court are in conflict with the applicable law of Kansas. For these reasons, we urge that certiorari should properly be denied.

Respectfully submitted.

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Clerk, U.S. Supreme Court, D.C.
FILED
NOV 20 1963
JOHN F. DAVIS, CLERK

No. 486

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

TIDEWATER OIL COMPANY,
Petitioner,

vs.

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As JACKSON BROTHERS,
Respondents.

PETITIONER'S REPLY BRIEF.

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No. 486

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

TIDEWATER OIL COMPANY,
Petitioner,

vs.

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As JACKSON BROTHERS,
Respondents.

PETITIONER'S REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Tidewater Oil Company, respectfully submits this brief in reply to respondents' brief opposing certiorari.

1. Respondents' "Statement of the Case."

Respondents' "Statement of the Case" (Respondents' Brief, 1-6)* presents a lurid picture of wrongdoing by

*Respondents' Brief Opposing Certiorari will be cited herein, for brevity, as Respondents' Brief. Other references will be to the Appendix to the Petition for Certiorari (e. g., A24) or to the record in the Court of Appeals (e. g., R10). All emphasis in this brief is supplied by us.

Tidewater. It is a melodramatic embellishment of findings which the District Court made, in an all-out adoption of respondents' contentions, as opposed to the position consistently maintained by Tidewater that "the conduct of secondary recovery operations in the vicinity of plaintiffs' lease has resulted in substantially greater recovery of oil from the reservoir by plaintiffs and in extensive benefits to the plaintiffs through their recovery of oil which they would not otherwise have recovered." (R40)

The Court of Appeals recognized that the District Court, in making its findings, credited respondents' witnesses "as against the contravailing and equally competent testimony of Tidewater." (A37) Of course if this case simply involved a choice between the testimony of one side or the other in a sharply contested trial, we would not be here praying for a writ of certiorari. The point in this case is that the respondents have had two chances, before different tribunals, to litigate the same issues. Respondents first followed the route prescribed in the Kansas statutes, seeking to stop Tidewater's secondary recovery program through a complaint before the Kansas Corporation Commission and on appeal in the Kansas courts. There they were completely unsuccessful in their attempts to show that Tidewater's actions were in any way unlawful or that they caused injury to respondents. Respondents then resorted to the Federal Court, which they were able to persuade to embrace their contentions, in square conflict with the findings and decision of the Kansas Commission, which had been reviewed and approved by the Kansas courts.

This conflict is so plain that the Court of Appeals is forced to concede that it exists. Comparing the findings of the District Court with the findings of the Kansas Commission, the Court of Appeals says (A36):

> "These findings are, to be sure, *irreconcilably inconsistent with the conclusive administrative findings* to the effect that the water flooding operations were carried on in a lawful manner."

The Court of Appeals also was unwilling to endorse the part of the District Court's judgment penalizing Tidewater by assessing punitive damages. Recognizing that "no one can deny the validity of the order permitting Tidewater to water flood its properties, or that the water flood operations were being conducted in accordance with a valid order" (A32), the Court of Appeals eliminated punitive damages because Tidewater's acts "were committed under color, and in accordance with, Kansas law" and they were "lawfully undertaken and lawfully done, in the interest of conservation." (A39)

The issue is therefore squarely presented in this case: Can Tidewater be mulcted in damages for conducting a conservation program, lawfully undertaken and lawfully done pursuant to a valid order of the Kansas Commission, on the basis of new and independent findings of the Federal Court which are "irreconcilably inconsistent" with the Kansas Commission's findings on the specific complaint by respondents against this very same water flood program?

2. The Kansas Commission's Finding That There Had Been No Injury to Respondents' Correlative Rights.

The Court of Appeals sought to avoid the binding effect of the Kansas Commission's decision by interpreting the Kansas Commission's Memorandum Opinion to be a holding that on the issue of correlative rights "there was nothing for the Commission to decide." (A28)

This pivotal holding of the Court of Appeals is plainly contrary to the actual decision of the Corporation Commission, that there had been no injury to respondents' correlative rights. Even the respondents do not argue that the Commission failed to determine that there was no injury to correlative rights. In substance and effect, they recognize, as they are forced to do, that the basic reasoning of the Court of Appeals (that the issue of injury to correlative rights was not decided by the Commission) is erroneous. Adopting an entirely different theory, respondents argue that "*the Commission's determination that there was no injury to correlative rights shown* was not tantamount to a finding that there was no damage to Jackson Bros.' property." (Respondents' Brief 9)

To support their contention, respondents take the astonishing position that "correlative rights" has nothing to do with the "property or property rights" of respondents in their oil and gas properties. They seek to make a distinction obviously contrary to elementary principles of the law of oil and gas.

Since oil and gas in underground reservoirs are fluids which move in response to differentials in pressure, without regard to property lines, and since the operations of any producer (in either primary or secondary recovery) unavoidably affect the property of other producers in the same common reservoir, the courts have long recognized that unique relationships exist between different producers, with regard to their property rights, which have usually been covered by the phrase "correlative rights." These property rights become particularly important when, in order to prevent waste and to insure maximum recovery of oil and gas, a state statute or administrative order regulates production. Such regulations usually provide that the authorized methods of production shall protect the

property rights of the various owners in the common reservoir in relation to each other or, in other words, their "correlative rights." This was recognized at an early time by a decision of this Court, as is stated in Summers, "Oil and Gas" (Permanent Edition, 1938), Section 63, pages 179-181:

> "The courts, particularly Chief Justice White in Ohio Oil Company v. Indiana, [177 U.S. 190] supported the constitutionality of such statutes on the ground that there was no taking of private *property* but merely a regulation of existing *property relations*. These existing *property relations*, called the *correlative rights* of the owners of land in the common source of supply, were not created by the statute, but held to exist because of the peculiar physical facts of oil and gas. The term '*correlative rights*' is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil and gas therefrom by lawful operations conducted on his own land limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of the oil and gas."

In a more recent text, the author, referring to the rights of owners of land overlying a common source of supply of oil and gas, says (Kuntz, "Law of Oil and Gas," (1962), Section 4.3, page 95):

> "The term '*correlative rights*' is a term used to refer to all of the rights and duties that exist between such landowners with regard to operations in a common source of supply."

In view of these standard authorities which state, so far as we know, the universally recognized meaning of "correlative rights," respondents are unjustified in accusing

petitioner of "a play on words" or "weasel-worded argument" (Respondents' Brief 9, 22) in saying that the determination by the Kansas Commission that there was no injury to respondents' correlative rights was a decision that there was no injury to respondents' property or property rights.

Nor can respondents sustain their endeavor to place an artificially restricted meaning upon "correlative rights" as defined by the Kansas Commission. The Commission's definition of "correlative rights" is as follows (A66):

> "Correlative Rights shall mean that each owner or producer in a common source of supply is privileged to produce therefrom only in such manner or amount as not to injure the reservoir to the detriment of others or to take an undue proportion of the oil or gas obtainable therefrom, or to cause undue drainage between developed leases."

Of course to "produce" oil and gas from a common source of supply involves far more than simply turning a valve or operating a pump so that the oil or gas will flow to the surface. It includes all of the operations which have as their ultimate object the recovery of the oil and gas. Specifically, it includes water flooding in secondary recovery operations. As the Court of Appeals itself recognized (A24):

> "Water flooding is a legally and scientifically accepted *method of producing oil and gas* by the introduction of foreign water into an oil bearing formation, usually after primary production methods are no longer profitable."

A fair consideration of respondents' complaint in this case can leave no doubt that they sought recovery on the ground that the "manner" used by Tidewater to "produce"

oil and gas from its leases caused damage to respondents, by injuring the reservoir beneath their lease to their detriment by displacing oil and gas with salt water and making it more expensive or impossible to recover part of the oil and gas, and by causing undue drainage of oil and gas from respondents' lease to other parts of the reservoir. Every one of the elements of damage which respondents contended for, as listed in their brief (page 11), is simply some alleged aspect of the total result of the asserted injury to the reservoir and undue drainage of oil and gas from their lease.

Respondents argue in effect that "correlative rights" relate only to the relative rate of withdrawals. This argument is plainly unsound. The regulation of the relative rates of withdrawals as between wells owned by different producers is only *one* way of protecting correlative rights. Such orders are usually called "proration orders." This case, however, involves not the rates of withdrawals but the "manner" of production, through water flooding. The opinion of the Commission clearly states that the question of withdrawals (the *amount* produced) is not involved, and that the *manner* of Tidewater's production, which was the basis of respondents' complaint, does not cause any injury to respondents' correlative rights, but is reasonable and in fact is the only way in which correlative rights can be protected. Respondents significantly omit a part of the Commission's opinion (Respondents' Brief 10), and we therefore quote the Commission's opinion, with the omitted sentence in its proper place, so that the Court may have before it in proper context the Commission's determination (A51):

> "The question of withdrawals from the common reservoir is not presented in this complaint involving the flooding of producing wells by water injected dur-

ing a lawful water flood operation. *In a water flood of this type the only way to prevent the movement of oil from lease to lease and thus protect correlative rights is to place the injection wells on the lease boundary.*

"Commission jurisdiction in matters involving production of oil and gas is by statute limited to the prevention of waste and the protection of correlative rights. No waste of natural resources *nor injury to correlative rights having been shown*, it appears that the instant proceeding presents no justiciable matter for action by this Commission."

The Commission plainly meant that, no waste nor injury to correlative rights having been shown, no case was presented which would justify action by the Commission in stopping the water flooding. The Commission therefore dissolved the temporary cease and desist order and dismissed the complaint.

The Commission's statement (A47-48, 50) that it was not the proper forum for awarding compensatory damages is not in any way inconsistent with its finding that there was no injury to correlative rights. A judgment for damages is a *remedy* which the Commission could not grant, but this does not mean that it had no jurisdiction to decide whether respondents' correlative rights had been violated. The Commission did have authority to grant another remedy in the form of a cease and desist order if it had found that there was injury to respondents' correlative rights. The Commission refused to grant that remedy because it found that there was no such injury shown. This is the same pivotal question, involving the same "operative facts" (A32) upon which respondents' claim in this action rests. This question having once been litigated and decided against them, they cannot by seeking a different remedy in another forum gain a right to a second determination of the same issue.

3. The Defense of Estoppel by Judgment Is Fully Supported by Kansas Law; and the Decision of the Court of Appeals Is in Conflict with Applicable State Law.

Petitioner before this Court has stressed the opinion of the Supreme Court of Kansas in *Jackson* v. *State Corporation Commission*, 186 Kan. 6, 348 P.2d 613 (1960), because it is the decision of the highest court of Kansas determining the pivotal issue in this case in petitioner's favor, in previous litigation between the same parties. There could not be, we submit, a clearer or more specific conflict between a decision of a Court of Appeals and the applicable state law than in the situation which is here presented, where the Court of Appeals has reached a conclusion directly contrary to the final adjudication of the very same basic issue which was decided in previous litigation between the same parties by the highest court of Kansas.

On the Kansas law of estoppel by judgment, there was no need for petitioner to cite Kansas authorites because the Court of Appeals recognized the Kansas law to be as follows (A29-30):

> "Kansas adheres to the salutary rule which plainly forbids a suitor to twice litigate matters against the same party, even on a different cause of action."

Specifically, as to the binding effect in general of the determinations of the Kansas Corporation Commission, the Court of Appeals further said (A30, 31):

> "We think, however, that a suitor may have a full day in court in an administrative tribunal, on matters within its competence, quite as effectively and conclusively as any other adjudicatory tribunal.

"The determinations of the Kansas Corporation Commission, of matters within its competence, is undoubtedly binding here, insofar as applicable to this asserted claim."

Since the Court of Appeals, in the passages just quoted, had correctly stated the Kansas law, there was no need for petitioner to cite cases to support these holdings. The conflict with applicable state law arose when the Court of Appeals refused to follow the Kansas law as decided in the previous litigation between the same parties, as to respondents' complaint that Tidewater's water flooding was wrongful because it injured respondents' correlative rights. The decision of the Court of Appeals is in direct conflict on that issue with the decision of the highest court of Kansas that Tidewater's water flooding was not wrongful and should not be stopped, because it was not shown to cause injury to respondents' property rights.

Respondents, therefore, evidently realizing that if the usual rules of estoppel by judgment are applied in this case they would not be entitled to a second litigation of the same basic issue previously decided against them, take the position that the Court of Appeals was wrong in stating the Kansas law as to estoppel by judgment. Respondents contend that Kansas law is (a) that an adjudication of an issue in a suit for injunctive relief is not binding in a subsequent damage suit between the same parties on the same facts (Respondents' P of 14), and (b) that a decision of an issue in administrative proceedings does not constitute a bar or estoppel in subsequent actions between the same parties in a court of general jurisdiction. (Respondents' Brief 16)

Respondents do not deny that the law generally accepted is what the Court of Appeals called "the salutary rule which plainly forbids a suitor to twice litigate matters

against the same party, even on a different cause of action." (A29-30) They assert, however, that there is a peculiar rule in Kansas to the contrary. The cases they cite do not support their contention.

In *Hofstetter* v. *Myers Construction, Inc.*, 170 Kan. 464, 227 P.2d 115 (1951), discussed in Respondents' Brief, page 14, the plaintiff first brought a damage suit in the County Court and obtained judgment, the defendant then appealing the case to the District Court. While this damage suit was pending in the District Court, the plaintiff and others brought an injunction suit relating to the same matter in the District Court. In the injunction suit, an injunction was granted, but on some issues findings were made adverse to the plaintiff. Later, when the damage suit went to trial in the District Court, the question was raised whether the adverse findings in the injunction suit were binding on the plaintiff in the damage suit. The Court stated the question before it as follows (227 P.2d at 118):

> "The question with which we are confronted, however, is whether under the peculiar circumstances the judgment in the later injunction action is res judicata of the issues in the earlier damage action."

The Court held that the findings in the injunction suit were not a bar to recovery in the damage suit, *because the suit for damages was limited to conditions existing before the injunction suit was brought*, whereas the injunction was based on the facts existing at the later time when the injunction suit was tried. As the Court said (227 P.2d at 119):

> "For anything that appears in the record the manner in which the plant was operated, which plaintiffs in the damage action urged damaged them, could

have been corrected by the time the injunction action was tried."

In other words, estoppel by judgment was denied, not because an injunction was sought in one suit whereas damages were sought in the other suit, but because the matter at issue in the damage suit involved conditions *at a different time* from those at issue in the injunction suit. This situation obviously does not exist here, because Tidewater's water flooding program, from its beginning until it is finally completed according to plans, was involved in the Kansas proceeding and likewise is involved in this action.

The Chanute Brick & Tile Company v. *The Gas Belt Fuel Company*, 89 Kan. 177, 130 Pac. 649 (1913), discussed in Respondents' Brief, page 15, was a case in which only a very brief *per curiam* opinion was written by the Court. However, in that case also, it is clear even from the brief opinion that the reason estoppel by judgment was not applied was not the difference in the remedy sought but because the subsequent litigation involved a matter not in issue in the first suit. Immediately following what respondents quote in their brief, the Court says in its opinion (130 Pac. 650):

"The evidence in the first suit could not have tended to sustain the issue here."

The other cases cited by respondents in a footnote on page 15 of their brief do not establish any peculiar rule of estoppel by judgment in Kansas. All that these cases hold is that a party relying upon estoppel by judgment must show that the issue in the second litigation was actually raised and determined in the first suit. If, as in the present case, *the same basic issue was raised and was determined*, then the fact that the plaintiff in the second suit

is asking for damages rather than for injunctive relief makes no difference.

With reference to respondents' second contention, it should be noted that the issue of alleged injury to respondents' correlative rights by Tidewater's water flooding was decided against respondents not only by the Kansas Commission, but upon appeal its decision was fully reviewed and in all things approved by the Kansas courts. It might be that a decision by the Commission alone, regarding its jurisdiction, would not be binding as a matter of law as to the construction of the relevant Kansas statutes. However, that is not the situation here. The Kansas Supreme Court has not only approved the findings of the Kansas Commission, but it has also held that its conclusions were correct as a matter of law.

The cases cited by respondents do not sustain the conclusion that estoppel by judgment is not applicable because the original decision against respondents was made by an administrative agency.

Renner v. *Monsanto Chemical Company*, 187 Kan. 158, 354 P.2d 326 (1960), discussed in respondents' brief, pages 7, 17, was a suit by a landowner to cancel an oil and gas lease. The lessee asserted that an order of the Corporation Commission, allocating production under a proration statute and attributing the acreage in question to wells drilled on other lands, was binding upon the question whether the plaintiff's land had been adequately developed. The order in question was a general order applicable to a large number of fields and pools, and there is nothing in the opinion to indicate that the landowner was a party to proceedings before the Corporation Commission resulting in the proration order or that there had been any judicial review of that order. Moreover, the Kansas Supreme Court

significantly points out that, in the first place, the Commission was not authorized by the Kansas statute to regulate the spacing of wells or to establish drilling units and that the proration order, relating to the attribution of acreage to producing oil wells, was not a finding by the Commission that the well would in fact drain the particular acreage but was simply for the purpose of insuring that the well in question would receive a fair share of the allowable production. Such being the construction the Court placed on the Kansas statutes, the conclusion naturally followed that the proration order had no bearing on the obligation of the lessee to develop the leased premises. This is made clear by a part of the opinion not quoted by the respondents, which reads as follows (354 P.2d 336):

> "The duty to drill wells under the covenant is not changed since proration involves only the restriction of production after the wells are drilled.
>
> "The purpose of the order attributing specific acreage to the south four Renner wells was only to establish a proration formula for each well to insure its fair share of the state's market for crude oil produced from the Cooper Field, and it did not constitute a finding that those wells would adequately and effectively drain the acreage attributed, or preclude judicial review of the plaintiffs' claim of a breach of the implied covenant to protect the premises against drainage."

Gas Service Company v. *Consolidated Gas Utilities Corporation*, 145 Kan. 423, 65 P.2d 584 (1937), discussed in respondents' Brief, page 17, involved an attack upon thirty-seven resolutions passed by the City of Wichita, on the ground that they had not been adopted in compliance with a statute requiring that ordinances should be read and published three times. The prior litigation between the same parties did not involve these ordinances, but

earlier ordinances, which were attacked on entirely different grounds. This point was noted in the opinion of the Kansas Supreme Court as follows (65 P.2d at 591):

> "The ground upon which plaintiff argues here that the thirty-seven subsequent resolutions are invalid was not raised by those pleadings in that hearing as to Ordinance No. 10-306 for the obvious reason that it had been passed in conformance with G.S. 1935, 13-2801. Neither was the validity of the three subsequent ordinances that had already been passed raised in that proceeding. The only question tried out before the Commission was whether public convenience and necessity would be served by permitting the companies to enter the field."

The Kansas Supreme Court then says that on the question of fact as to whether public convenience and necessity would be served by granting the franchise, the Court "would not overturn a finding of fact reached by an administrative tribunal such as the Commission." The Court goes on to say, in the language quoted in respondents' brief, page 16, that on the legal question as to whether the thirty-seven subsequent ordinances were passed in conformity with the statute, the decision of the Commission "would not have had the binding effect of a judicial determination." (65 P.2d 591) It is submitted that the Kansas court was simply noting the difference between the effect of a fact finding by an administrative agency on a matter within its jurisdiction and its legal conclusion as to the interpretation of a statute. Fact-findings of the agency are binding on the court if there is substantial evidence to support them, but legal conclusions are not binding on the court, unless as in this case those conclusions have been judicially reviewed and approved by the highest court of the state having jurisdiction.

State ex rel. Boynton v. *Public Service Commission*, 135 Kan. 491, 11 P.2d 999 (1932), discussed in Respondents' Brief, page 17, involved the question of the validity of a statute which authorized the Public Service Commission upon the complaint of a shipper to investigate and determine whether a carrier was charging an unreasonable rate and to issue a certificate as to what was a reasonable rate or charge, "which shall be prima facie evidence of the matter therein stated." The Court held that the statute was valid, as against the objection that it gave the Public Service Commission authority to award a final judgment for damages in reparation for excessive charges. Immediately after saying what is quoted in Respondents' Brief, page 17, the Kansas court said (11 P.2d at 1002):

> "The recitals of the certificate are prima facie evidence if or when demand for reparation becomes the subject of controversy before a court of competent jurisdiction. It is settled law that the Legislature may prescribe what matters shall have the force of prima facie evidence."

This holding that the statute was valid in making the certificate of the Commission prima facie evidence that excessive rates had been charged, is no authority against the application of the rule of estoppel by judgment in the present case where, pursuant to Kansas statutes, the Corporation Commission's order determining that respondents' correlative rights had not been injured, has been reviewed and affirmed by the Kansas courts, both as to the findings of fact and the legal conclusions upon which the order was based.

Other cases cited by respondents in the footnotes on page 19 of their brief are not discussed by respondents and we see no point in discussing them here. They do not relate to situations comparable to the case here and,

in general, deal with administrative orders which were legislative or executive in nature. Obviously such orders are substantially different from decisions, such as in this case, where the proceedings before the Corporation Commission were instituted by the filing of the "complaint" by Jackson Brothers as "complainants" against Tidewater, as "defendant" (R18), containing the usual elements of a pleading alleging injury to respondents' oil and gas properties as a basis for relief in the nature of an injunction to stop Tidewater's water flooding (R18-22) and where the Commission proceeded to hear evidence and made its findings and conclusions in the form of a "memorandum opinion." (A41) The proceedings in this case before the Commission had every essential element of a judicial proceeding. This case is wholly different from one where an administrative agency issues a legislative or executive order.

Respondents in their brief (page 23) call attention to the fact that the Kansas Corporation Commission is not a party to this action. This fact only serves to emphasize that the proceedings before the Kansas Commission were essentially judicial in character and that the Commission, in passing upon Jackson Brothers' complaint against Tidewater, was acting in an impartial and not in a partisan role. There is no more reason why the Kansas Corporation Commission should seek to intervene in this case to defend its determination than there is for the Judges of the Supreme Court of Kansas to intervene and defend their judgment approving in all respects the findings and conclusions of the Commission.

4. Since the Decision by the Kansas Commission and the Kansas Courts Was Not Only That Tidewater's Operations Were Lawful but Also That They Did Not Cause Injury to Respondents' Correlative Rights, This Previous Decision Precludes Any Recovery by Respondents on Any Theory of Liability.

The decision by the Kansas Commission and the Kansas courts that Tidewater's water flooding should not be enjoined was on the ground that, under the facts as found by the Commission, the water flooding did not cause waste and it did not cause injury to Jackson Brothers' correlative rights. The water flooding could not be lawful if it caused either waste or injury to respondents' correlative rights. The determination that Tidewater's actions were lawful is therefore inseparable from the determination that its actions did not cause injury to respondents' correlative rights. This case is therefore entirely different from cases such as those involving condemnation proceedings, where actions may be lawfully taken even though damage may necessarily follow. The respondents are therefore barred from recovery of damages in this case, not only because there has been a conclusive adjudication that Tidewater's water flooding is lawful under Kansas law, but also because there has been a final adjudication against Jackson Brothers that Tidewater's water flooding did not injure Jackson Brothers' property rights. On no theory of liability can there be any recovery of damages where no injury is shown.

Certainly we do not contend that one producer can destroy the property of another, wilfully or negligently, without responsibility for the tortious act, nor do we contend that one man's property can be taken directly or indirectly without compensation for the benefit of another.

To answer directly respondents' arguments (Respondents' Brief 21-22), what we do contend is that where the state authorities have provided a means, which respondents in this case have taken advantage of, to have a determination made as to whether a secondary recovery program causes injury to their property rights, respondents are bound by the determination against them and cannot go into a different tribunal and have the very same issue litigated all over again. We submit that this conclusion is applicable with particular force where, as in this case, the questions involved are pure questions of state law and where the losing litigants in the state courts have switched their forum to the federal courts in the hope of securing more favorable results.

None of the cases cited by respondents to sustain their claim that Tidewater can be held liable in damages for its lawful actions are in point in this case.

Helms v. *Eastern Kansas Oil Company*, 102 Kan. 164, 169 Pac. 208 (1917), discussed in Respondents' Brief 20, 22, was simply a suit for damages resulting from a nuisance caused by the escape of waste oil and sediments from the defendant's refinery into a water course which passed across the plaintiff's land. The plaintiff in that case particularly alleged a cause of action for a "nuisance." (169 Pac. at 209) The Kansas court does quote in its opinion general language from the opinion in *Hauck* v. *Pipe Line Co., Ltd.*, 153 Pa. St. 366, 375, but the reason that the Kansas court holds that the defendant was liable for the nuisance was that it found that the particular acts complained of by the plaintiff in that case were both unreasonable and unlawful (169 P.2d at page 210):

> "When the injurious substances were thrown upon the plaintiff's land in the excessive quantities and in the manner set forth in plaintiff's petition, the de-

fendant's use of its property became *both unreasonable and unlawful.*"

The *Helms* case is therefore clearly not analogous to the present case. Here the particular acts of Tidewater complained of by Jackson Brothers have been adjudicated to be lawful and reasonable by the Kansas Supreme Court in approving the findings and conclusions of the Kansas Corporation Commission. The *Helms* case is no authority for imposing liability upon Tidewater for its lawful acts, and most certainly it is no authority for a second litigation of the issue as to whether Tidewater's actions injured Jackson Brothers' property rights in the oil reservoir.

Respondents also cite three cases alleged to show that a party blasting with dynamite will be held responsible for damage to adjoining property even where the blasting is done under a permit from some public authority. It is submitted that the cases do not even support the statement of their holding as contained in respondents' brief. We cannot find anything in the opinion in *City of Cherryvale* v. *Studyvin*, 76 Kan. 285, 91 Pac. 60 (1907), indicating that any permit for blasting was obtained, the court simply holding that the city in that case was not excused from the exercise of reasonable care in blasting. In *Rost* v. *Union Pacific Railroad Company*, 95 Kan. 713, 149 Pac. 679 (1915), the opinion says that "a permit" had been secured by the railroad, but the opinion does not disclose from whom the permit had been obtained or what its provisions were or whether the defendant's acts conformed to the requirements of the permits. In *Bacon* v. *Railway Company*, 109 Kan. 234, 198 Pac. 942 (1921), it affirmatively appears that the basis for liability was that the blasting was not done in conformity with the permit. Reviewing the evidence, the court says (198 Pac. at 944) that "the necessary inference is, the defendant abused its permission

. . ." using heavy charges located at points not authorized in the permit and causing damage that would not have occurred if the limitations of the permit had been observed.

In none of the cases just discussed, nor in the other cases cited without discussion by respondents on page 21 of their brief, was there involved the same question as is presented here, where there has already been a litigation before a competent state tribunal of the pivotal question which is the basis for asserted liability in this case.

5. The Fact That the Kansas Commission Could Not Give a Judgment for Damages Does Not Mean That Its Decision That Jackson Brothers Had Not Suffered Any Injury to Their Correlative Rights Would Not Be Binding upon Jackson Brothers in a Later Damage Suit.

Of course the Kansas Corporation Commission could not enter a judgment for damages for alleged injury to the property rights of one producer as a result of the operations of another producer in the same reservoir. In this sense, and only in this sense, did the Commission lack power "to adjudge tort liability." The Commission did have jurisdiction to determine controverted issues of fact which would be crucial in determining tort liability as well as in determining whether the Commission should enter an order requiring the defendant operator to cease the operations complained of. Specifically in this case, the Commission had to determine, and it did determine, that Tidewater's water flooding did not injure Jackson Brothers' correlative rights before the Commission could lawfully refuse Jackson Brothers' prayer to stop the water flooding by Tidewater. This same issue, as to whether Jackson Brothers were injured or on the other hand were

benefited by Tidewater's water flooding, is the pivotal question in this damage action.

The Court of Appeals has in fact on this issue made two inconsistent statements of the law. Near the beginning of its opinion, it says (A31):

> "The determinations of the Kansas Corporation Commission, of matters within its competence, is undoubtedly binding here, in so far as applicable to this asserted claim."

We respectfully submit that it is impossible to reconcile what the Court of Appeals correctly says is the law in the passage just quoted above, with what it later says as its reason for refusing to sustain the defense of estoppel by judgment (A32):

> "It is wholly inadmissible and incompatible with fundamental principles of due process to hold that a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that basis, by conclusive adjudication of the operative facts upon which his claim must rest."

The answer to this latter, inconsistent statement is obvious. *Respondents have had their day in court* in the previous litigation, where there was a determination of the same "operative facts" upon which their claim must rest in this case. The Kansas District Court specifically held that Jackson Brothers "have now had their day in court and had a determination of their correlative rights." (A53) The Kansas Supreme Court upon appeal noted that the trial court had held that "plaintiffs had now had their day in court and their correlative rights had been determined" (A61), and the Kansas Supreme Court held

that the trial court was correct in affirming the decision of the Commission based on its findings. (A63)

Surely every requirement of due process has been amply satisfied where not only has the administrative agency given a full hearing and decided the issues made by the parties' pleadings and evidence, but also its decision has been reviewed and affirmed by courts of competent jurisdiction.

Tidewater has already gone through one protracted litigation before the Kansas Commission and in the Kansas courts defending its same water flooding program against the same complaints of injury which Jackson Brothers assert in this proceeding. Tidewater should not be required to litigate all over again in the federal courts the same basic issues as to the "operative facts" which were finally decided in Tidewater's favor by the Kansas courts.

CONCLUSION.

Respondents attempt to belittle the importance of this case (Respondents' Brief 23) by saying that while the amount of the judgment is large, the case is of no consequence to anyone except the parties. Once again respondents' argument runs counter to self-evident reality. How will it be possible (if the Court of Appeals' decision is not corrected) for an oil producer to proceed with confidence with a secondary recovery program knowing that the competent state agency and the state courts may be "second guessed" by the federal courts and that he may be penalized by a huge judgment for damages for doing the very same things that have been authorized and approved by the state authorities as a means of conserving the state's natural resources and as a proper method to be

employed for the protection of the correlative rights of other producers in the same common reservoir?

The crippling effect of the decision of the Court of Appeals upon secondary recovery programs is obviously of grave public concern. The memorandum opinion of the Kansas Corporation Commission, in this case shows that Tidewater's water flooding program will "permit the recovery of oil and gas which would otherwise be lost," that the cumulative production from Tidewater's secondary recovery project in this reservoir, from 1949 to 1956, was "some 2,327,785 barrels of oil from approximately 900 acres" and that comparable secondary recovery can be expected from additional areas in the same reservoir through continued water flooding (A50). It can hardly be said under such circumstances that the result of stopping this water flooding program would be "of no consequence to anyone except the plaintiffs and the defendant."

Of course it is senseless to argue that Tidewater's water flooding project has not been "interfered with." (Respondents' Brief 23). Nothing could paralyze secondary recovery programs quicker than a huge judgment for damages for doing what even the Court of Appeals holds to be acts which were committed "under color and in accordance with Kansas law" and were "lawfully undertaken and lawfully done in the interest of conservation." (A39)

It is submitted that the conflict between the decision of the Court of Appeals and the applicable Kansas law is not merely a matter of private concern. It is also an important matter of public concern, relating directly to the administration of justice as between the state and federal courts. For these reasons petitioner prays that the writ

of certiorari be granted and the judgments below be reversed.

Respectfully submitted,

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